72516-5

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September 29, 2015
Court of Appeals
Division I
State of Washington

NO. 72516-5-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

JIMI J. HAMILTON,

Appellant

BRIEF OF RESPONDENT-CROSS-APPELLANT

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I. COUNTER ASSIGNMENTS OF ERROR

1. The trial court erred in entering the conclusion of law to the extent that it is a finding of fact that there was "possible collusion [by CO Reeder] with other DOC employees in tampering with the videotape, suggests government misconduct both voluntary and dishonest." 2 CP 601.

2. The trial court erred when it entered finding of fact number 59 that "requiring the defendant to meet with his attorneys on March 12, 2014 in the no-contact room used for all professional visits in the SCCC-IMU was a purposeful intrusion into the attorney-client relationship." 1 CP 16.

3. The court erred when it concluded that the arrangements for the May 7, 2013 attorney visit with the defendant constituted governmental mismanagement or misconduct. 2 CP 599.

4. The court erred when it concluded that "Officer Reeder's conduct [of the May 19, 2013 search of the defendant's cell] constituted governmental misconduct both voluntary and dishonest." 2 CP 601

II. ISSUES

1. When no DOC officers heard or saw any communication between the defendant and his attorneys during an attorney client

meeting held in a no-contact room at the prison where the defendant was an inmate, was the trial court justified in denying the motion to dismiss for violation of attorney-client communications by DOC?

2. Where there was no evidence presented that a DOC officer read the defendant's legal materials during a cell search was it error to deny the defendant's motion to dismiss for an intrusion into attorney client communication?

3. Did the trial court err when it denied a motion to dismiss the charge for governmental misconduct pursuant to CrR 8.3(b)?

4. Should this court remand the case to the trial court to place the burden of proof to establish prejudice in a motion to dismiss for intrusion into attorney-client communications where the defendant did not meet his threshold burden to prove misconduct, the court later did conduct the prejudice analysis placing the burden of proof on the prosecution, and the record is clear beyond a reasonable doubt that the defendant was not prejudiced?

5. Should the trial court have granted a motion for mistrial made during the course of jury selection based on a comment that a juror made, where voir dire had not been completed and the

parties had an opportunity to inquire into any taint the juror's comment may have had?

6. Did the court properly reject a proposed curative instruction where it was an incorrect statement of fact at that point in the trial and a comment on the evidence?

7. The defense expert reviewed all of the defendant records from the prison and Pierce County Jail as part of his evaluation before rendering an opinion on the diminished capacity defense. When prison records were used to impeach the expert's onions were they erroneously admitted as hearsay evidence?

8. Did the defendant preserve an objection to cross examination of a defense expert witness using prison records that the witness relied on in part to base his conclusions on the basis that the acts described in those records were improper character evidence under ER 404(b)?

9. If it was error to allow the prosecutor to use the prison records to impeach the defense expert, was it harmless?

10. Did the defendant receive constitutionally adequate assistance of counsel in the manner in which counsel handled objections to cross examination of the defense expert witness, the defendant, and the prosecutor's closing argument?

11 Is the defendant entitled to a new trial on the basis of prosecutorial error, where some of the claimed errors were immediately struck and the jury instructed to disregard, and other challenged conduct was not error?

12 Where the defendant did not object to the prosecutor's arguments in closing, if those arguments were improper could an instruction have cured any prejudice?

13. Is the defendant entitled to a new trial on the basis of the cumulative error doctrine?

14. Has the defendant preserved a claim of error that the reasonable doubt instruction misstated the law? Was the reasonable doubt instruction a correct statement of the law?

15. Were the dates on which prior offenses were committed and for which the defendant was convicted a part of the fact of a prior conviction that the trial judge was allowed to determine when it found the defendant had two prior "strike" offenses?

III. ISSUES RELATED TO COUNTER ASSIGNMENTS OF ERROR

1. Was there sufficient evidence in the record to support the trial court's finding that a prison surveillance video was tampered with when the testimony was that neither the officer involved in the

cell search that was the subject of the video or the staff member that arranged for its recording tampered with it, and the system operates on a time lapse which accounts for the jerky appearance of the recording?

2. When no one from DOC attempted to listen in on communications between the defendant and his attorneys or heard anything said in those conversations, was there a purposeful intrusion into the attorney client relationship when DOC failed to follow a court order that required it to allow contact visits in violation of DOC policy?

3. Was it governmental misconduct to require an inmate housed in IMU to meet with his attorneys in a no-contact room pursuant to prison policy for management IMU inmates?

4. Did a DOC officer's cell search of an inmate housed in IMU constitute governmental misconduct?

IV. STATEMENT OF THE CASE

A. FACTS RELATED TO THE ASSAULT OF CORRECTIONS OFFICER TROUT.

On August 23, 2012 the defendant, Jimi Hamilton, violently and without warning attacked corrections officer Nicholas Trout, causing bilateral fractures of his jaw and cheeks. As a result of the assault Officer Trout had his jaw wired shut for one month and was

off of work for one year. Two years after the assault he continued to have ongoing pain in his cheek due to nerve damage. 9/19/14 RP 13-17, 108, 190-193. The entire assault was recorded on video. Ex. 80 (sub 254).[1]

The defendant was an inmate at the special offender unit (SOU) at the Monroe Correctional Center (MCC). SOU is designed to treat inmates who have either mental or behavioral illnesses. He had been in the F unit since January or February 2012. F unit is the last unit at SOU before inmates were transferred to general population. 9/18/14 RP 97-99, 102.

On August 23, 2012 about 8:00 a.m. Officer Kozlovskiy contacted the defendant to talk to him privately about a complaint made against him. There was a concern the defendant was stalking a counselor. The defendant was asked to stop loitering around the counselor's office. The defendant denied the accusation, but agreed that he would not go around those offices. 9/19/14 RP 73-77.

There was a meeting scheduled with the defendant and his treatment team in the late morning to discuss with him a change in plans for a transfer from SOU. He had been scheduled to transition

[1] Instructions on how to play the video are attached as Appendix A.

to Twin Rivers Unit (TRU) but that plan was cancelled as a result of a keep separate order with another inmate housed there. The defendant asked John Cates, a counselor, several times about the transfer on August 23. Mr. Cates did not think the defendant would take the news well so he put the defendant off, reminding him of the scheduled meeting. The defendant also approached Deborah Franek, the mental health supervisor, three times between 8 a.m. and 9:50 a.m. to talk to her about some issues. Ms. Franek also reminded the defendant that he had a meeting scheduled later that morning to address those issues. The third time he approached Ms. Franek the defendant gave her an emergency grievance. When she realized the grievance was about her, Ms. Franek gave it to the shift lieutenant. 9/17/14 RP 42-43, 46-48; 9/18/14 RP 109-117.

Officer Trout was working as a relief officer in F unit that day. Throughout the morning the defendant kept going to Officer Trout's desk asking the officer to allow him to do things that the officer could not give permission for. The defendant got upset with Officer Trout and started becoming louder and more disruptive. The defendant gave Officer Trout a grievance which was transferred to the shift lieutenant. The grievance was denied. At one point the

defendant said he was about to snap. 9/17/14 RP 141-143; 9/19/14 RP 184-189.

At about 10:00 a.m. the defendant was again at Officer Trout's desk being disruptive. Officer Trout told the defendant to "yard in" which means to go back to his cell. The defendant turned and walked toward the stairway to his cell. As he walked by some other inmates the defendant said "oh so you think that's funny Trout?" or "do you want to fuck with me?" As the defendant approached the stairs he said "fuck it." He then turned and charged Officer Trout knocking him to the ground. The defendant stood over the officer repeatedly punching the officer with his right and left fists. 9/17/14 RP 97-98, 159-161; 9/18/14 RP 9; 9/19/14 RP 189-190; Ex. 80.

Dan Cowles, a classification counselor, was working in his office when he heard a yell and then saw the defendant racing by his office. When he ran out of his office he saw the defendant repeatedly striking Officer Trout, who was lying on the ground motionless. Mr. Cowles activated the emergency alarm and then ordered the defendant to stop. The defendant then stopped and stared for a moment. Mr. Cowles directed the unit to yard in, and the defendant returned to his cell. 9/16/14 RP 104-113.

When other prison personnel came to Officer Trout's aid he was initially unconscious lying in a pool of his blood. Officer Trout's injuries were so devastating that the EMTs who came to treat him could not recognize him from his security badge. 9/19/14 RP 114-115, 136; 9/23/14 RP 95.

Officer Howerton and Officer Johnson went to the defendant's cell to place him in restraints. The defendant told Officer Johnson that he was sorry and that he had snapped. He said "I fucked up, Officer Howerton. I think I fucked up, Officer Howerton. Man, I really shouldn't have done that." Officer Howerton asked the defendant if he was going to comply with cuffing. The defendant said "I don't have any beef with you, Officer Howerton." As the defendant was being escorted across the yard to the infirmary he called to Ms. Franek, telling her that she was going to have to listen to him now. 9/18/14 RP 63-67, 120; 9/19/14 RP 24.

B. FACTS RELATED TO THE DEFENDANT'S MOTIONS TO DISMISS FOR GOVERNMENTAL MISCONDUCT.

1. Facts From The Motion To Dismiss Based On DOC Personnel Conduct In May 2013 At Clallam Bay Corrections Center.

The defendant was charged with one count of second degree assault. 2 CP 790-791. He posted bail and was returned to

the Department of Corrections pending trial. In May 2013 the defendant was incarcerated in IMU at Clallam Bay Corrections Center (Clallam Bay). Inmates housed in IMU are classified at the highest security risk. Special procedures are employed when transporting or arranging visits with those inmates. Both attorney and family visits take place in a room that prevents contact between the inmate and visitor. Visits with attorneys are not recorded. 8/22/13 RP 184-190; 8/23/13 RP 838-384.

There are three or four no contact visiting rooms located between the shift sergeant's office and the shift lieutenant's office. Inmates who have visits in those rooms are escorted through the shift sergeant's office and the hallway leading to the room. Once in the room the door to the hallway is shut and the inmate's restraints are removed. Visitors access the no contact room through the visitation room. The visitor side of the no contact room has a curtain to separate the visitor from anyone else in the visitation room. The walls to the no contact rooms are concrete, and a glass barrier separates the inmate from the visitor. Any items passed to the inmate from the visitor would have to be ferried to the inmate by a corrections officer. Contraband would not be passed to the inmate. The copy machine is located next to the shift lieutenant's

office. It is possible that someone in the copy room could hear an inmate and visitor talking if they were talking loudly. 8/23/13 RP 361-367.

On May 7, 2013 the defendant had a scheduled meeting with his trial attorneys and their investigator at Clallam Bay. Prior to that date defendant's attorneys expressed concern about the hallway that ran behind the defendant's side of the no contact room where they met. The defendant's counselor, Norman Bright, and Lt. McKenny worked to try to accommodate the attorney's concerns. Lt. McKenny had the doors on either end of the hallway secured and put up a sign stating no access. Lt. McKenny did not see anyone in the hallway when he went to use the copy machine. Barriers were also placed in the visitation room behind the side of the no contact room where the attorneys and investigators were seated. 8/22/13 RP 190-93; 8/23/13 RP 360-361, 423.

Despite efforts to ensure their privacy the investigator noted 18 people walking in the hallway behind the defendant's side of the no contact room. In addition there were a number of people in the visitation room. The investigator heard phones ringing and people talking, although she could not make out what people were saying. Officers in the sergeant's office could not hear what was being said

in the visitation booth, even if someone had yelled to get an officer's attention. Lt. McKenny, whose office was in that back hallway, did not listen in or hear any conversation between the defendant and his attorney. 8/23/13 RP 365-366, 396-398, 418-421.

During the May 7 visit the attorneys wanted to pass some documents to the defendant for his review and signature. One of the attorneys flagged down Sgt. Schwenker who had been passing through the visitation room. Some of the documents were typed, while others were handwritten on yellow legal pads. Sgt. Schwenker did not read either of the documents the attorneys wanted passed to the defendant. Sgt. Schwenker did not know the proper procedure for such a request so she took the documents to Sgt. Folks for advice. After consulting with Sgt. Folks she learned that the typed documents could be directly passed to the defendant. However, in order to show the defendant the contents of the handwritten documents the attorneys were required to hold them up to the window. 8/23/13 RP 398-402, 426-427.

Cell searches are conducted routinely to search for contraband. Contraband includes anything that can be made into a weapon. In IMU cell searches are typically done by one officer.

There is no specific time limit for cell searches. Officers are expected to do a thorough search. While typical search takes 3 -10 minutes the search may take longer depending on how much material an inmate has in his cell and if contraband is found during the course of the search. It is not unreasonable for a search to take 25 minutes if the circumstances warranted it. 8/22/13 RP 26-29, 79, 126, 163; 8/23/13 RP 370-71; 8/26/13 RP 486-488.

On May 19, 2013 the defendant was out of his cell for yard time when Officer Reeder conducted a cell search. He searched a box containing paperwork and found a clip and a pen at the bottom of the box that were confiscated as contraband and disposed of in the "hot trash."[2] Hot trash is a container that only DOC personnel handle or dispose of. Officer Reeder also searched the defendant's linens, photos, containers that were not factory sealed, and mattress. The search took approximately 25 minutes. One inmate reported seeing Officer Reeder in a reflection in a window. He testified he saw Officer Reeder with an open folder in his hands for

[2] The Appellant mischaracterizes the evidence by stating that Officer Reeder put the items in his pocket. BOA at 16. The testimony was that the items could have been put in a pocket, not that they were put in his pocket. He testified that he did not recall specifically what he did with the items as he left the cell, only that he was sure they went into the "hot trash". 8/23/13 RP 229. That is the appropriate place for confiscated contraband. 8/26/13 RP 495.

15 minutes and looking at the folder for 3 minutes. Officer Reeder denied reading any of the defendant's paperwork, including the defendant's legal materials. Several inmates testified that upon leaving the defendant's cell Officer Reeder commented that he "'was just seeing' or 'reading how a person could sucker-punch a CO and then claim he didn't form the intent'" or words to that effect. The defendant later complained to his counselor that Officer Reeder had missed some staples during the cell search. 8/22/13 RP 35, 82-83, 87, 156, 205; 8/23/13 RP 228-229, 240-244, 278; 2 CP 707; August 2013 dismissal motion Ex. 1. (sub 77).

Clallam Bay has a security video system that recorded officer and offender movements. The video system is old and records movements on a time lapse. As a result some frames are shown sequentially by 100ths of a second. Other frames miss some 100ths of a second. A video of the F pod showed Officer Reeder entering the pod from the left and heading toward the defendant's cell at 10:34:20 a.m. A video of F pod looking from the right sped up at 10:34:02 a.m. and did not slow down until 10:34:59 a.m. The frames skipped from 10:34:02.578 a.m. to 10:34:59.062

a.m. when played in real time mode.[3] As a result the video did not record Officer Reeder entering the defendant's cell. A copy of the video was provided to the prosecutor and defense attorney. Officer Reeder had nothing to do with copying the video. Ms. Stubbs had made copies of videos before; she did not do anything to tamper with the video. 8/23/13 RP 298; 8/26/13 RP 459-460, 500.

No DOC personnel, including Officer Reeder was aware of the defendant's strategy for his pending assault case. Sgt. Schwenker and Lt. McKenny who were on duty in the area where the May 7 visit occurred, Yvette Stubbs, a DOC administrative assistant, Steven Blakemen, the IMU custody unit supervisor, and Officer Reeder did not hear what the defendant and his attorneys talked about. Nor has CUS Blakemen heard other DOC personnel discussing the defendant's case or his possible strategy. No DOC personnel had communicated with either the prosecutor or the investigator assigned to the pending assault case. The detective assigned to the case was aware the defendant may assert a mental defense from his interview with the defendant that occurred before the May 2013 attorney visit and cell search. 8/22/13 RP 178-180;

[3] When the video is advanced frame by frame it skips several times by 100ths of a second.

8/23/13 RP 245-246, 294, 366, 372, 402; 8/26/13 RP 474, 492.

Before the court issued a decision on the motion to dismiss it entered two orders sua sponte. The first order directed DOC to handle the defendant's legal mail in a particular manner. 3 CP 904. The second order concerned the manner in which DOC was required to accommodate attorney visits with the defendant. The court specifically ordered that visits were to take place where the defendant could receive documents directly from counsel. It states that the education room was an appropriate venue for this purpose, but the no-contact room was not. 3 CP 905; 8/26/13 RP 625-627. DOC was not represented at the hearing when the court entered those orders.

2. Facts From The Motion To Dismiss Based On DOC Personnel Handling Of Attorney Contact Visits In 2014 At Stafford Creek.

By March 2014 the defendant had been transferred to Stafford Creek Corrections Center (Stafford Creek) IMU. An offender is housed in IMU when his behavior presents or has demonstrated a risk to others. The defendant had a history of 180 infractions, which was considered extensive by DOC administration. Those infractions included assaults, threats against staff and other offenders, throwing things, starting fires, blocking

locking devices, and having dirty UAs. DOC determined the defendant presented a safety risk that was mitigated by housing him in IMU. 6/19/14 RP 21-22, 24-25, 167.

Throughout the prison system inmates housed in IMU are only allowed visits in a no-contact room. The policy was instituted because there had been a history of contraband introduced into the prison and escape attempts. Even with no contact between IMU inmates and attorney visitors, there had been occasions when offenders engaged in sexually inappropriate behavior. To decrease the risk of prisoner misbehavior, visits are monitored through cameras in addition to permitting visits only in no contact rooms. Cameras do not record audio and are placed so that a monitor does not view or record documents. The policy was applied uniformly because a deviation from the policy could create the opportunity to take advantage of the system. A deviation from the policy would require the superintendent's approval. 6/19/14 RP 28-30, 56, 68-69; 8/11/14 RP 43.

A copy of the court order requiring contact visits between the defendant and his attorney was forwarded to the Deputy Director of Prisons, Scott Frakes. Mr. Frakes consulted with the Attorney General's Office to try to accommodate the security concerns in the

prison and the court's order. The Department transferred the defendant to the Snohomish County Jail where there is a contact visitation room for offenders and their attorneys. Eventually he was transferred to Stafford Creek. 6/16/14 RP 38-39; 6/19/14 RP 3, 30-32.

The defendant's attorneys scheduled a visit for March 12, 2014 with the defendant through the counselor at that facility. Although Mr. Frakes had contacted the superintended of Stafford Creek regarding the court's August 2013 orders the custody unit supervisor for IMU and the legal liaison officer at Stafford Creek was unaware of the court's order setting the conditions for attorney visits. The defendant's attorney did not make any special requests for a contact room for the visit. Nor did she contact the Attorney General's office prior to the visit to facilitate a deviation from the normal policy for visits with offenders in IMU, although counsel had contacted the assigned assistant attorney general before then about other matters. When the attorneys arrived the visit was scheduled in a no contact room pursuant to general prison policy for IMU offenders. 6/16/14 RP 28-29; 6/19/14 RP 144, 166, 215; 8/11/14 RP 46.

Before the visit the defendant had contacted the correctional unit supervisor for IMU, William Swain. The defendant showed CUS Swain the court order. During the visit one of the defendant's attorneys talked to CUS Swain about the order and a contact visit. CUS Swain did not have the authority to override the visitation policy. He brought the issue to the legal liaison officer to resolve the issue. The legal liaison officer was unable to speak to anyone at the attorney general's office for advice. Because those staff members did not have authority to override the policy, no deviation from the policy was approved. When CUS Swain returned to advise the attorney she had been escorted out of the facility because it was time for the daily count. 6/19/14 RP 112, 115-119, 145-147.

No one from DOC listened in on the defendant's conversations with his attorneys. Although there were video cameras in the no contact room they did not record any audio. The video recording is overwritten after nine days. No one from DOC was aware of what the defendant's strategy was. No one from DOC passed on any information about the defendant's case to the investigating detective. 6/17/14 RP 70-71; 6/19/14 RP 32, 114,

117, 138, 148, 173, 178; 8/11/14 RP 13-17, 19-20, 51-52, 55, 60, 72, 80-82, 102-103, 111, 121, 127, 142.

The hearing on the defendant's second motion to dismiss began on June 16, 2014 and concluded on August 12, 2014. On June 19 the court discussed how DOC could accommodate contact visits between the defendant and his attorneys with the superintendent of Stafford Creek. During a recess in the proceedings the defendant's attorneys scheduled another visit with the defendant at Stafford Creek for July 24, 2014. That visit did occur in a lunchroom where the attorneys could pass papers to and from the defendant.[4] 6/19/14 RP 204-210; 8/11/14 RP 48-49.

C. FACTS RELATED TO THE DIMINISHED CAPACITY DEFENSE.

The defendant raised a diminished capacity defense at trial. In support of that defense the defendant presented the testimony of Dr. Stuart Grassian. Dr. Grassian reviewed the defendant's entire medical file from DOC and Pierce County Jail, interviewed the defendant, his wife, and his mother, and the police reports. 9/22/14 RP 81-82, 87. The defendant told Dr. Grassian that he was

[4] Deviations from the no contact policy for IMU visits are so rare that there had only been one other contact visit between an attorney and an IMU inmate. That contact visit was also pursuant to a court order. 8/11/14 RP 50.

returning to his cell when he had an eerie feeling that someone was behind him. He turned and perceived an inmate was behind him. That inmate had harmed another inmate some 3 years earlier. He believed that inmate would have a reason to harm him, so attacked that person to disarm him. 9/22/14 RP109-111. Based on his review of those materials Dr. Grassian concluded that the defendant suffered from bipolar mood disorder. He further concluded that the defendant was in a dissociative state on that date, and could not form the intent to attack the officer. 9/22/14 RP 99, 113-115.

No one who had contact with the defendant in the years leading up to the assault or on the day of the assault observed the defendant demonstrate any sign that he was ever hallucinating. The defendant had never expressed fear of another inmate. 9/17/14 RP 25, 29, 43, 61; 9/18/14 RP 54-55, 57, 103-106, 109, 112, 114; 9/19/14 RP 21-22, 40-41, 46, 82, 140-143; 9/29/14 RP 37, 49, 117.

The defendant was evaluated by Dr. Clair Sauvagnat from Western State Hospital. She reviewed some of the defendant's medical records, the video of the assault, and talked to the defendant. She diagnosed the defendant with anti-social

personality disorder and borderline personality disorder based on a records review and interview with the defendant. She concluded to a reasonable degree of psychological certainty that the defendant had the ability to form the intent to assault at the time he assaulted Officer Trout. 9/25/14 RP 53-66.

V. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTIONS TO DISMISS FOR GOVERNMENTAL MISCONDUCT.

Before trial the defendant brought two different motions to dismiss the assault charge on the basis of alleged governmental misconduct by personnel employed by DOC. In the first motion the defendant alleged a violation of his right to attorney client privilege as a result of a cell search on May 19, 2013 and providing only a no contact booth for an attorney client visit on May 7, 2013. 2 CP 669-688. In the second motion to dismiss the defendant alleged the Department of Corrections interfered with his attorney-client relationship when it violated the August 26, 2013 order directing attorney visits occur where the paperwork could pass directly

between the defendant and counsel. 1 CP 346-347.[5]

1. Two Of The Court's Findings Are Not Supported By Substantial Evidence.

Findings of fact are reviewed to determine if they are supported by substantial evidence. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the findings." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the first motion to dismiss the trial court found that the surveillance video from the May 19, 2013 cell search at Clallam Bay had been tampered with. It found that there had been possible collusion between Officer Reeder and other DOC employees in tampering with that video. 2 CP 601 (line 12-13), 603 (line 14). The finding appears to be based on the condition of the video tape provided to the prosecution and defense by DOC. Ex. 1 – August 2013 motion to dismiss. The video shows two angles. In the F pod right angle the video shows the door to the defendant's cell behind a stairwell. The F pod left view shows the doorway leading into F

[5] The motion also alleged the defendant was deprived of his legal materials when did not immediately receive materials he brought to court upon his transfer back to prison, when materials left behind in his prison cell were disposed of, and when a document was confiscated as potential contraband and later returned. He does not challenge the court's decision as to these bases on appeal.

pod, but does not show the defendant's cell door. The F pod left angle shows Officer Reeder entering the pod and walking toward the defendant's cell at 10:34:20 a.m. and leaving the pod at 11:00:00 a.m. The F pod right angle speeds up at 10:34:02 a.m. until 10:34:59 a.m. As a result the recording does not show Officer Reeder entering the defendant's cell. The F pod right angle shows Officer Reeder leaving the pod at 11:00:34 a.m. Some of the video advances by 1/100th of a minute. However, throughout the video the recording periodically jumps forward by more than a single hundredth of a minute.

Officer Reeder testified that he had nothing to do with recording or copying the video. 8/23/13 RP 298. Yvette Stubbs, the administrative assistant that responded to the public disclosure request for the video, testified that she did not tamper with the video. 8/26/13 RP 459-460. The video system is an old system that operates on time lapse which accounts for the jumps in the recording. 8/26/13 RP 460, 500.

The court's only specific finding that Officer Reeder was not credible related to his testimony that he did not read the defendant's legal materials when he conducted the cell search. 2 CP 598. It did not make a finding that Officer Reeder's testimony

was not credible in toto. Nor did it specifically find the officer's testimony that he had nothing to do with recording or copying the video was not credible. At best the court inferentially found that testimony not credible. A finding that the officer was not credible on that point is not the same as an affirmative factual finding that the video had been tampered with. Other personnel testified that the video had not been tampered with. Evidence that the recording system was old and operated on a time lapse system presented affirmative evidence the portion of the video that sped up was a mechanical malfunction, not an intentional tampering with the video. Because there was no affirmative evidence that DOC personnel tampered with the video, the court's findings that it had been tampered with and that there was collusion by DOC personnel to do so, is unsupported by the record.

In the second motion to dismiss the court found the arrangements for the meeting between the defendant and his attorneys on March 12, 2014 at Stafford Creek "was a purposeful intrusion into the attorney client relationship." 1 CP 16 (line 5-7). This finding is somewhat confusing in light of the court's additional finding that there was no intentional eavesdropping, no audio recording, and no evidence that anyone watched the video

recording of that visit or passed information on to the prosecution. Id at lines 8-13. The only "intrusion" into the relationship at that meeting was the inability to pass paperwork back and forth between the attorneys and the defendant. That fact alone did not interfere with the relationship as contemplated by cases addressing that kind of due process violation.

An intrusion into the attorney client relationship occurs when a government agent purposefully obtains information about communications between the attorney and client. This kind of intrusion occurred when police recorded conversations between the defendant and his attorney through a microphone that had been installed in the professional visit room at the jail. State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963). It also occurred when an officer listened to recorded phone conversations between the defendant and his attorney. State v. Pena Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014). It also occurred when officers looked at documents memorializing communications between the defendant and his attorney. State v. Granaki, 90 Wn. App. 598, 601-02, 959 P.2d 667 (1998), State v. Garza, 99 Wn. App. 291, 293, 994 P.2d 868, review denied, 141 Wn.2d 1014 (2000).

Here no DOC employee listened in on conversations between the defendant and his attorneys. Nor did they review any documents containing communications between the defendant and his attorneys. 6/17/14 RP 70; 6/19/14 RP 29, 114, 117, 137, 148, 178; 8/11/14 RP 19-20, 51-55, 72, 82, 102-103, 111, 127, 139, 142-143. Unlike the earlier meeting with the defendant, no DOC officer was enlisted to assist in ferrying paperwork between the attorney and the defendant. Instead they were told that paperwork had to be mailed. 6/16/14 RP 31, 104. While it may not have been as convenient to share information with the defendant, nothing prevented the attorneys and the defendant from holding up documents that needed review to the window separating them. Although the defendant expressed concern about mailing documents because he was aware DOC personnel scanned the mail to inmates that alone does not demonstrate an intrusion into the attorney client relationship. A due process violation of the attorney client relationship requires an actual intrusion into communications between the attorney and client. The record does not support that the conditions of the March 12, 2014 meeting with the defendant's attorneys resulted in any such intrusion.

A reviewing court is not bound by the trial court's erroneous factual finding. Hill, 123 Wn.2d at 647. Here, neither the finding that the cell search video had been tampered with nor the finding that there was a purposeful intrusion into the attorney client relationship supported by the record. This court is therefore not bound by that factual finding as a basis on which to conclude DOC committed misconduct.

2. The Record Does Not Support The Court's Conclusion That Officer Reeder's Cell Search And DOC Handling Of An Attorney Visit In May 2013 At Clallam Bay Corrections Center Constituted Governmental Misconduct Or Mismanagement.

In the first motion to dismiss the defense alleged DOC intruded into confidential communications between the defendant and his attorneys violating his right to due process, effective assistance of counsel, and a fair trial. 2 CP 678. The defendant relied on the court's reasoning in Cory, supra. 2 CP 669, 678.

After hearing testimony from inmates, the defendant, the defense investigator and DOC personnel the court concluded that there were several instances of governmental misconduct. The court found that the classroom was available for attorney client meetings. It found the policy at Clallam Bay which put inmates in the visitor's room for those confidential meetings constituted

mismanagement. The court also found it was misconduct to have DOC employees transfer documents between the defendant and his attorneys during those visits. It found it was misconduct to allow DOC employees in the hallway behind the defendant while he was meeting with his attorneys because that could have been avoided. 2 CP 599.

The court also found that Officer Reeder's cell search constituted "voluntary and dishonest" governmental misconduct. 2 CP 601. It supported this conclusion in part by the "possible collusion with other DOC employees in tampering with the videotape." 2 CP 601. As discussed above the court is not bound by this latter finding as it is not supported by the record.[6]

Conclusions of law are reviewed de novo. State v. Veltri, 136 Wn. App. 818, 821, 150 P.3d 1178 (2007). The court's conclusions must be supported by its factual findings. Id. None of the courts factual findings that are supported by the record support the conclusion that DOC actions constituted governmental

[6] The court also found that the DOC policy regarding legal mail also constituted government mismanagement to the degree that confidential legal mail is scanned. 2 CP 600. Evidence of that policy related to an incident where a different inmate's legal mail was scanned. Because there was no evidence introduced that showed the defendant's legal mail was scanned to the point that it invaded attorney client communications, it was irrelevant to the defendant's motion to dismiss the assault charge against him on that basis.

mismanagement or misconduct in either the manner in which DOC provided space for meetings with the defendant's attorney or Officer Reeder's cell search.

Courts have found governmental misconduct in cases where the record showed government employees purposefully intruded into attorney client communications. In Cory a defendant who failed to make bail pretrial met with his attorney at the jail in a room designated for professional visits. The sheriff's office deliberately intruded into discussions between the defendant and his attorney by installing a microphone in the room, and recording those conversations. Cory, 67 Wn.2d at 372. The court found this conduct violated the defendant's constitutional right to counsel. Id. at 377. The court assumed that information gained from that eavesdropping was communicated to the prosecution Id at n. 3. Since the prejudice resulting from this conduct could not be isolated, the court dismissed the charge. Id. at 377-378.

In Granaki the State conceded that government misconduct occurred when the State's managing witness read the defense attorney's notes during a break mid-trial. Granaki, 90 Wn. App. at 601-02. The notepad was introduced as evidence at the hearing on defendant's motion to dismiss. Id. at 601 n.1. Because the notepad

contained a distillation of conversations between counsel and the defendant, this court found the officer's conduct was similar to the eavesdropping the court found subject to sanction in Cory. Id. at 603.

In Garza jail officers were responding to a legitimate concern that some inmates had tried to escape when they thoroughly searched the inmates' cells. During the cell search the inmates' property, "including legal documents containing private communications with their attorneys, was seized and 'gone through.'" Garza, 99 Wn. App. at 293. Those legal materials were retained for 32 days before they were returned to the inmates. Id. The court found an intrusion into defendants' private relationships with their attorneys when jail officers seized, examined, and possibly read the defendant's materials during the course of cell searches. Id. at 296.

Most recently the court found egregious misconduct resulting from an intrusion into a defendant's phone calls with his attorney in State v. Pena Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014). There a detective investigating potential witness tampering listened to all of the phone calls the defendant made from jail, including six calls he made to his attorney. Id. at 816.

In each of these cases the record demonstrated that a government purposefully gained information regarding confidential communications between a defendant and his attorney. In contrast, here the court made no such finding regarding either the attorney client visit or the cell search. Nor does the record support such a finding.

With respect to the attorney client visitation room the court made no finding either orally or in writing that anyone from DOC tried to listen in on the defendant's conversation with his attorneys at the May 7, 2013 meeting. Further the court made no finding that anyone from DOC actually heard what the defendant and his attorney were talking about. At best the record would support two findings. First that DOC made some attempt to make a secure visitation booth more private, although there were people behind both the defendant and the attorneys at the time the visitation occurred. Those efforts included putting up signs on the defendant's side of the booth restricting access to the hallway behind him, and putting up barriers in the visitation room behind the attorneys to keep some distance between other visitors and the attorneys. Second, that someone who made an effort to listen could hear that there was a conversation going on between the defendant

and his attorney but not the substance of that conversation. No one testified they heard any sounds or conversations coming from the visitation booth. While the defense investigator could hear noises from the hallway behind the defendant, she could not hear any specific conversations. 8/23/13 RP 419.

The court's conclusion that the visitation arrangement constituted misconduct apparently is based on the belief that the opportunity to invade attorney client communications is the same as an actual purposeful invasion of those communications. No authority supports that conclusion. Cory, Granaki, Garza, and Pena Fuentes stand for the proposition that an actual intrusion into an attorney client communication is misconduct. Absent any actual intrusion, or attempt to intrude, there is no governmental misconduct.

Similarly, the court found Officer Reeder's cell search was misconduct. While the court found the officer had read some of the defendant's documents, it also found that it could not tell what paperwork was read, since no paperwork from the defendant's cell had been submitted in evidence. It did not find that the officer read any legal documents associated with the assault charge or any other case that the defendant had pending at the time. It also found

that neither the prosecutor nor the Monroe Police knew about the cell search until the defendant filed the motion. 2 CP 598; 9/24/13 RP 4. Without finding the officer invaded any attorney client communications the court erred in concluding that his conduct during the cell search constituted misconduct.

The defendant states that witnesses testified that Officer Reeder appeared to be reading the defendant's legal materials, citing to the testimony of several other inmates. BOA at 30. However the inmates either did not see into the defendant's cell, or could not tell what kind of paperwork the officer was looking at. 8/22/13 RP 117, 162-163. These statements do not support the court's conclusion that Officer Reeder's cell search constituted government misconduct by intrusion into the attorney client communications.

The defendant also asserts that DOC personnel could hear his discussions with his attorneys because they "practically had to yell to communicate through the Plexiglas divider" to support the court's finding that the visitation arrangements constituted misconduct. BOA at 33. The investigator testified that it was loud in the visitation room behind them, and she could barely hear the defendant through the glass, but that they could talk through it.

8/23/13 RP 415, 417; 8/24/13 RP 433. The defendant testified that due to the noise behind the defense team he had to speak "more loud," but he did not say that he was yelling. 8/24/13 RP 557. The defendant also states, without citation to the record, that during the attorney visit DOC personnel read documents that his counsel asked to have provided to him. Officer Schwenker was asked to pass the paperwork. She recognized that some of the documents were typewritten while others were legal pads. But she also said that she did not read the contents of those documents. 8/23/13 RP 399-400. Since one could recognize the nature of the documents without reading them, her testimony is not inconsistent, and it does not support the defendant's assertion that the documents were read.

Since there was no support for the conclusion that there was governmental misconduct arising from either the May 2013 attorney- client meeting or cell search, the court did not err when it denied the motion to dismiss the charge for an intrusion into attorney client communications from those incidents. Even if the court concludes that the trial court's conclusions were supported by the record, the trial court still did not abuse its discretion when it denied the motion. Unlike Cory and Granaki here there was no

evidence that anyone from DOC learned anything about the defendant's defense. None of the DOC officers involved were witnesses to the assault. And no one communicated anything to the prosecution. Thus any error arising from those two instances was harmless beyond a reasonable doubt. Pena Fuentes, 179 Wn.2d at 819 (the extreme remedy of dismissal is not required when there is no possibility of prejudice to the defendant).

3. Department Of Corrections Did Not Commit Misconduct When The Defendant Met With His Attorneys In March 2012 At Stafford Creek.

In his second motion to dismiss for governmental misconduct the defendant alleged several instances in which DOC intruded into attorney client communications. 6/17/14 RP 26-29; 8/12/14 RP 11. On appeal the defendant relies solely on the arrangements made for the March 12, 2014 attorney visit at Stafford Creek to claim his right to counsel and due process rights were violated. BOA at 36-37. The defendant argues that DOC's "willful noncompliance with the trial courts [August 23, 2013] orders..." constitutes "outrageous misconduct." Id.

The trial court's findings, supported by substantial evidence, support the conclusion that no governmental misconduct occurred resulting from the March 12, 2014 meeting. The court found that

although the meeting occurred in a no contact booth containing a surveillance camera, no audio recording was made and DOC staff could not hear what was said between the defendant and his attorneys. 1 CP 13. The court also found that there had been no intentional eavesdropping into the defendant's communications with counsel. The court concluded these security measures were justified to protect inmates, staff, and the public, including defense attorneys and investigators. Further, that the inability to pass documents back and forth on one occasion did not damage the attorney client relationship. 1 CP 14, 16. The court also concluded that any intrusion by DOC did not violate the defendant's constitutional right to counsel and fair trial. 1 CP 22-23.

The court did not find that DOC willfully violated its order to allow contact visits, nor would the record support that finding. The evidence showed Deputy Director Frakes was aware of the order when it entered, and made efforts to comply with the order. The record does not reflect why the line supervisor or the legal liaison officer was unaware of the court's orders. The order conflicted with standard prison policy for visits with inmates in IMU, and neither officer had the authority to override the policy. Despite that some

effort was made to inquire into overriding that policy[7]. These actions support the conclusion that despite the court's order, DOC did not commit misconduct justifying dismissal when it did not provide a contact room for visitation on one occasion. Because there was no intrusion into attorney client communications, dismissal was not required. Pena Fuentes, 179 Wn.2d at 819.

4. The Trial Court Acted Within Its Discretion When It Did Not Dismiss The Charge Under CrR 8.3(b).

Alternatively the defendant argues that the court should have dismissed the assault charge under CrR 8.3(b). Pursuant to that rule a court may, in the furtherance of justice, dismiss a criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the defendant which materially affect the accused's right to a fair trial. Id. Dismissal under CrR 8.3(b) is an extraordinary remedy which the trial court should employ only as a last resort. State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). Before dismissing a case on this basis a trial court should consider "intermediate remedial steps." Seattle v.

[7] There was a question whether the court had jurisdiction to enter the orders directing how DOC handled attorney visits with the defendant. 6/19/14 RP 219. A court must have jurisdiction over a party to enter a valid order. State v. Werner, 129 Wn.2d 485, 493, 918 P.2d 916 (1996). DOC was not a party to the criminal case. Nor was it represented at the hearing when the court entered the order regarding attorney visits.

Holifield, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010). A trial court's decision on a CrR 8.3(b) motion to dismiss is reviewed for manifest abuse of discretion. State v. Puapuaga, 164 Wn.2d 515, 520-521, 192 P.3d 360 (2008). A manifest abuse of discretion occurs when the court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State v. Sanders, 86 Wn. App. 466, 469, 937 P.2d 193 (1997).

To dismiss a charge under CrR 8.3(b) the defendant must show two things; (1) arbitrary action or governmental misconduct, and (2) prejudice affecting his right to a fair trial. State v. Michielli, 132 Wn.2d 229, 239-240, 937 P.2d 587 (1997). A trial court may not dismiss the charge under CrR 8.3(b) absent a showing of arbitrary action or governmental misconduct. Id. It is also improper to dismiss a charge on this basis absent material prejudice to the defendant's rights. State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003).

A court may be justified in dismissing a charge under CrR 8.3(b) when the government's actions violate the defendant's right to due process. Id. Conduct violates due process when it shocks the universal sense of fairness. State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). The court will look to the totality of the

circumstances to determine whether this kind of government misconduct occurred. Id. at 21.

In Lively the court addressed whether a prosecution for delivery of a controlled substance should be dismissed on this basis where a police informant targeted a vulnerable woman he met at an NA/AA meeting, entered into a romantic relationship with her, and subsequently induced her to deliver cocaine to an undercover officer. Id. at 5-7. Although the defendant cites Lively in support of his claim of government misconduct, he does not explain how the analysis in that case applied here. Since the claim of misconduct here stems from justified security measures and not an undercover drug investigation as in Lively, many of the factors the court used to evaluate the government's conduct in that case do not apply here. However one factor is relevant; whether the police motive was to prevent crime or protect the public.

Here the record from the second motion to dismiss supports the court's finding that the DOC policies controlling cell searches and attorney visits with IMU inmates were designed to protect inmates, attorneys, officers, and the public. As discussed in section V.A.3, DOC policies were based on a documented history of inmates' misbehavior that presented a risk to inmates, attorneys,

and others. Given that history, and the complete lack of evidence that anyone from DOC used those policies to intrude into confidential communications between the defendant and his attorneys in either motion to dismiss on that basis, imposition of those policies cannot be said to constitute a violation of the defendant's due process rights.

Further the absence of any evidence there was any intrusion into communications between the defendant and his attorneys provided a tenable basis on which the court to find the defendant had not demonstrated material prejudice to his right to fair trial. 2 CP 604. The court's observations of the defendant's interactions with his attorneys also gave it a tenable basis on which to conclude that no conduct on the part of DOC had any effect on his trust in them or his relationship with them. 2 CP 605.

The court's decision to employ alternative remedies short of dismissal was also not manifestly unreasonable. As the court observed at best there was only a possibility that DOC employees gained information about the defendant's case. 2 CP 606-607. The offense occurred at SOU in Monroe. The alleged misconduct occurred at Clallam Bay and Stafford Creek, completely different prisons. There was no evidence that anyone from either of those

prisons knew anyone from the Special Offender Unit, or had communicated anything about the defendant's case to anyone there. The evidence affirmatively showed that no one from DOC had communicated anything that to the prosecution about the defendant's case. The record showed that before any alleged misconduct the defense had revealed the nature of the defense that it would assert at trial in open court. 4 CP __ (Sub 59).[8] The court's orders entered after the first motion to dismiss were directed at ensuring there was another layer of protection to ensure that communications remained confidential between the defendant and his attorneys.

The defendant argues the court abused its discretion when it concluded that suppressing evidence of the cell search could eliminate any prejudice to the defendant's case. 2 CP 603, BOA at 39. He argues that suppressing evidence provided him no remedy, since he did not know what information Officer Reeder got in the cell search and what had been done with it. However there was no evidence that anyone actually read the defendant's legal mail. The

[8] Ex. A to declaration of Cindy Larsen is a letter from the defendant received by the court January 30, 2013 stating in part that his only defense is diminished capacity. Ex. B to declaration of Cindy Larsen is a transcript of a hearing on February 19, 2013. At page 9 defense counsel states that the State has been put on notice that the defense will assert a diminished capacity defense.

court's order to ensure no one at DOC read the mail addressed that concern raised in the defendant's first motion to dismiss.

The defendant next argues that the court's remedies did not go far enough; he points out that the court never ordered DOC officers to not disclose anything that had been learned by intercepting attorney client communications with each other. Because there was no evidence any DOC officer intercepted a communication between the defendant and his attorneys, there was no evidence any such information had been shared with other DOC employees. However, the court imposed a second remedy for the misconduct it found associated with Officer Reeder's cell search when it reserved further sanctions in lieu of dismissal. 2 CP 607. This remedy provided a substantial incentive for no such dissemination to occur even if DOC officers had obtained information from the defendant's communications with his attorneys.

The defendant complains that the court did not do anything when in March 2014 DOC violated the order concerning attorney client contact visits by placing the defendant and counsel in a no contact room. The court did not abuse its discretion when it did not impose further sanction for violation of that order. The violation

appeared to have been the result of negligence rather than a willful violation of the court's order. Once the miscommunication concerning the order had been brought to DOC administration officials' attention the problem was remedied. 1 CP 14-15. There was no evidence that communication between the defendant and his attorney was completely impaired during that meeting. 1 CP 16. And there was no evidence that anyone from DOC eavesdropped into that meeting. The court found the visitation arrangement was justifiable security measure designed to protect inmates, attorneys, staff, and the public. 1 CP 14. It also found no one from DOC could hear any conversation between the defendant and his attorneys and there was no intentional eavesdropping. 1 CP 13, 16. The court concluded that any intrusion by DOC did not violate the defendant's constitutional right to a fair trial, and the defendant suffered no prejudice. 1 CP 22-23. Given these findings and conclusions the court had no reason to sanction the State by dismissing the charge as a result of a single violation of the court's remedial order.

Finally the defendant also points out that the court refused to adopt any of the proposed sanctions for Officer Reeder's cell search at Clallam Bay. Remedial measures short of dismissal are

meant to cure any prejudice to the defendant resulting from government misconduct. In Cory the court found no remedy short of dismissal would suffice because "there is no way to isolate the prejudice resulting from an eavesdropping activity" of the kind that occurred in that case. Cory, 62 Wn.2d at 377. However where other sanctions can serve to eliminate the prejudice to the defendant from an unlawful intrusion a court does not abuse its discretion by employing them. Granaki, 90 Wn. App. at 604.

The defendant's proposed sanctions were punitive rather than remedial. The defendant sought an order suppressing the video of the August 23, 2012 assault on Officer Trout at the SOU on the basis that the court found the video of the May 11, 2013 cell search at Clallam Bay had been tampered with. Defense counsel acknowledged that evidence produced at the second motion to dismiss showed the videos could not be tampered with. 9/12/14 RP 40. Alternatively the defense asked the court to instruct the jury that it previously found a DOC video had been tampered with. 9/12/14 RP 40-42. The court denied the motion to suppress the video showing the assault because there was no evidence that video had been tampered with. It denied the request for a jury instruction because that would be a comment on the evidence. 9/12/14 RP

52. These reasons were tenable grounds on which to deny the defense request.

The defense also sought an order suppressing any testimony from DOC personnel regarding the defendant's intent. 9/12/14 RP 40. That testimony would potentially be offered to rebut the conclusions of the defense expert on the defendant's diminished capacity defense. 9/12/14 RP 50-51. Since the court was not clear what that evidence would entail, it properly deferred consideration of that request until other objections to the evidence were raised. 9/12/14 RP 51.

5. It Is Not Necessary To Remand For An Additional Hearing On The Motion To Dismiss Because The Defendant Failed To Meet His Initial Burden To Prove Government Misconduct Resulting In An Intrusion Into Attorney Client Communications.

Alternatively the defendant asks the court to remand the case to the trial court for another hearing on the motion to dismiss. He argues the trial court erroneously placed the burden to establish prejudice on him. He relies on the court's finding that "there is no evidence that the prosecution has actually obtained any information" relating to his case that it would use to prejudice him. 2 CP 604. This statement was in the context of discussing whether the prejudice to the defendant should be presumed. The court did

not presume prejudice, as evidence by its later discussion about whether the defendant had demonstrated prejudice. The statement did not assign the burden to establish prejudice to either party. Rather it addressed the preliminary burden placed on the defendant to show a government intrusion into his confidential communications.

The court adopted a two-step process in analyzing claims that the government intruded into the confidential relationship between a defendant and his attorney in United States v. Danielson, 325 F.3d 1054 (9th Cir. 2003). First a defendant alleging such violation has the burden to establish that someone acting on behalf of the government affirmatively acted to intrude into the attorney-client relationship. Id. at 1071. Once the prima facie case of intrusion had been made, then the burden shifted to the government to show that there had been no prejudice to the defendant as a result of that intrusion. Id.

This approach is consistent with the manner in which similar claims have been addressed by courts in this state. In each of the cases addressing an alleged violation an affirmative intrusion into the attorney client relationship had been established before the court considered the question of prejudice. Cory, 62 Wn.2d at 372

(police installed a microphone in the jail conference room and recorded discussions between the defendant and counsel), Granaki, 90 Wn. App. at 600 (lead detective looked at legal pads containing notes about conversations between the defendant and his attorney left on defense counsel table during mid-trial recess), Garza, 99 Wn. App. at 293 (jail guards confiscated inmates' legal materials containing private communications with their attorneys and were "gone through."), Pena Fuentes, 179 Wn.2d at 816-817 (police officer listened to recorded calls the defendant made while in jail to his attorney). As in Danielson, once a purposeful intrusion was shown the burden shifted to the State to prove the absence of prejudice. Pena Fuentes, 179 Wn.2d at 819-820.

Here the court found no actual intrusion into any private conversations between the defendant and his attorneys. Nor was there evidence that information gained from an intrusion into the defendant's relationship with his attorneys had been communicated to anyone involved in the prosecution of his case.

At the first motion to dismiss the investigating detective testified that he had not discussed the case with anyone at DOC other than those directly involved as witnesses to the assault. Specifically he had not talked to anyone at Clallam Bay about the

defense strategy. 8/22/13 RP 179-180. DOC personnel who were on duty at the time the defendant met with his attorney did not hear their conversations and the conversation was not recorded. 8/22/13 RP 194; 8/23/13 RP 366, 383, 397. Officer Reeder testified he did not read the defendant's paperwork during the search of the defendant's cell. 8/23/13 RP 244. Although the trial court did not find this testimony credible, there was no evidence produced establishing the officer had read materials related to the assault case. For that reason the court found that it was not clear what paperwork was read and nothing from any paperwork in the defendant's cell was provided to the prosecutor or investigating agency. 2 CP 598.

Despite the lack of evidence that there had been an intrusion into attorney client communications the court nonetheless found that the defendant had met the first prong by establishing governmental misconduct. 2 CP 601. In its response to the motion for reconsideration the State alternatively argued that it had met its burden under Pena Fuentes. 4 CP __ (sub 116 at page 8-11). The court therefore had the opportunity to consider whether the State had proved beyond a reasonable doubt the absence of prejudice to the defense for an intrusion into attorney client communications.

Although the court did not think that the attorney visit and cell search at issue in the second motion to dismiss warranted analysis under Pena Fuentes, it nonetheless conducted that analysis. 819/14 RP 102, 108-109. Although the court did not specifically state the basis for denying the motion to reconsider the first motion to dismiss under Pena Fuentes it is reasonable to believe the court considered the State's arguments, and found that it had met its burden of proof.

Even if the court is unwilling to presume the trial court considered the State's arguments under Pena Fuentes, remand is unnecessary. The evidence presented at the hearings on both of the defendant's motions to dismiss established beyond a reasonable doubt that the defendant was not prejudiced by any intrusion into the defendant's relationship with his attorneys.

The court noted four ways in which the defendant may have been prejudiced by an intrusion into that relationship; (1) evidence gained through an intrusion would be used against the defendant at trial, (2) the prosecution was using confidential information relating to the defense strategies, (3) the intrusion destroyed the defendant's confidence in his attorneys, or (4) that the intrusion

would otherwise give the State an unfair advantage at trial. Garza, 99 Wn. App. at 301.

The court specifically found (1), (2), and (4) had not occurred. 2 CP 598, 604, 605. These findings were supported by evidence that DOC personnel did not overhear the defendant's conversations with his attorneys and the lack of evidence that Officer Reeder reviewed any legal documents related to the assault case. The court also relied on its observations of the defendant to conclude that whatever intrusion occurred, it did not affect the defendant's confidence in his attorneys. 2 CP 605-606. The courts conclusion was later supported by findings demonstrating that the defendant's relationship with his attorneys was affected by aspects of his own personality, and not the result of DOC conduct. Finding of fact 76, 1 CP 21. The court found that before the first instance of alleged misconduct at Clallam Bay the defendant asked the court to discharge his attorneys because he did not trust them. One day later he retracted the request admitting that he had problems with paranoia, and stated that he was satisfied with his attorneys. Thereafter the defendant made similar requests on several occasions, only to later retract them. 1 CP 19-20.

In addition, the record shows the defendant was not prejudiced because his defense strategy had previously been revealed to the State. Testimony from other inmates regarding Officer Reeder's "sucker punch" comment showed at best that he was looking for evidence related to the diminished capacity defense. Defense counsel had already revealed that the defendant would assert that defense before the cell search occurred. Ex. 36, 37, 4 CP__ (sub 77 hearing on first motion to dismiss). A defendant does not suffer prejudice from an intrusion that reveals the defense strategy where the defense has already revealed its strategy to the prosecution. Danielson, 324 F.3d at 1070, United States v. Irwin, 612 F.2d 1182, 1189 (9th Cir. 1980).

This record demonstrates that even if the court did not analyze whether the State had proved that the defendant was not prejudiced by any DOC intrusion beyond a reasonable doubt, it was harmless. The record amply demonstrates that the State gained no information concerning the defendant's communications with his attorneys. The defendant's relationship with his attorney was not affected by DOC conduct but rather was the result of his own personality. Under these circumstances remand for a hearing to

analyze whether the State proved no prejudice to the defendant beyond a reasonable doubt is not necessary.

B. A JURORS COMMENT DURING VOIR DIRE DID NOT JUSTIFY A MISTRIAL. THE TRIAL COURT PROPERLY REJECTED A PROPOSED CURATIVE INSTRUCTION.

Juror 18 indicated in a juror questionnaire that he had been previously convicted of second degree assault. When he was asked about that conviction he at first stated that he was convicted at trial, but later stated that he pled guilty and that he had served 72 days of work release. 9/15/14 RP 112-113. In a hearing outside the presence of the jury before jury selection was complete the defense moved for a mistrial based on Juror 18's comments regarding his sentence. The defense argued the statement would give the jury a misimpression about the seriousness of the case. 9/15/14 RP 176-177.

The court denied the motion for a mistrial based on where they were in the proceedings and the limited information provided in the juror's statement. The court offered the defense the opportunity to craft a curative instruction if it chose to do so. 9/15/14 RP 177. The next day the defense proposed a curative instruction that read.

> If Mr. Hamilton is convicted of this charge, the Court will have no discretion and the only possible sentence is life in prison without the possibility of parole.

9/16/14 RP 4; 1 CP 137.

The court maintained its previous ruling on the motion for mistrial. It rejected the defense proposed curative instruction. The court suggested that it may draft another proposed instruction, but ultimately did not do so. 9/16/15 RP 6. The defense did not take exception to the court's failure to give a curative instruction addressing the juror's comments. 9/30/15 RP 75-104.

The defendant argues that the trial court erred when it did not grant his motion for mistrial as a result of Juror 18 stating the nature of his sentence when he was convicted of second degree assault. Alternatively the defense argues that the court erred by failing to give his proposed curative instruction. Because the court did not abuse its discretion in either case no error was committed.

Initially the court should reject the contention that the juror's comment constituted a trial error justifying either a mistrial motion or a curative instruction. Jurors certainly had no information based on Juror 18's comments about what factors led to the sentence imposed in his case. One juror recognized that a sentence could depend on factors such as criminal history. 9/16/14 RP 37. Nor does the record suggest that jurors would believe that a 72 day work release sentence was insignificant. To the average law-

abiding citizen any time in lock up might be considered significant. The possibility that a 72 day sentence may be imposed does not automatically lead to the inference that jurors would be less careful in considering the evidence because they believed that sentence was so insignificant that they should give the case anything less than their impartial consideration of the evidence.

Even if the juror's comment were error, the court did not abuse its discretion when it denied the mid-jury selection motion for mistrial. A trial court should grant a motion for mistrial only when the defendant has been so prejudiced that nothing short of a new trial will insure that the defendant receives a fair trial. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert denied, 479 U.S. 995 (1986). A decision to deny a motion for new trial is reviewed for an abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. Id.

At the time the defendant made the motion for mistrial based on Juror 18's statement jury selection was still ongoing. Both the State and the defense had an opportunity to question jurors further about juror's ability to follow the court's instructions and juror's attitudes toward the charge in light of Juror 18's experience. The

responses from jurors indicated that Juror 18's comment about the sentence imposed in his case did not affect the manner in which jurors would handle the defendant's case.

After the motion defense specifically questioned jurors whether they would or would not take the case seriously if they believed the punishment was relatively light. While some jurors suggested that they might take some cases less seriously than others, other jurors indicated that all kinds of cases deserved juror's full consideration and careful deliberation. 9/16/14 RP 36-38. As one juror observed "careful" meant to be fair and impartial, and to render a verdict based on the testimony at trial. 9/16/14 RP 37.

After Juror 18's comment one juror recognized that someone could go to prison for a shoplifting charge "depending on their history." 9/16/14 RP 37. For that reason the juror would give equal attention to the case regardless of the severity of the charge. No juror indicated that he or she would have difficulty presuming the defendant was innocent. After posing several hypotheticals jurors indicated they would listen to the evidence before making a decision. 9/15/14 RP 149-156.

The court was aware that it would be instructing jurors "You may not consider the fact that punishment may follow conviction

except insofar as it may tend to make you careful." 1 CP 50; 9/15/14 RP 177. Because jury selection had not been completed the parties had additional opportunity to question juror's ability to follow the court's instructions as well as assess juror's attitudes toward the seriousness of the offense. The parties also had the opportunity to assess whether jurors developed any preconceptions about what would happened in the event of a guilty verdict in light of the juror's statements. Juror's answers to these questions could resolve any speculation about what weight and effect that information would have on juror's deliberations.

Given these circumstances the trial court did not abuse its discretion when it denied the motion for mistrial made mid-jury selection on the basis of one juror's comments. Rather than presume the jurors would be influenced by the juror's comments, it allowed the parties to find out if jurors had been so influenced. The defense did not renew the motion for mistrial on the basis of the juror's statements at the end of jury selection. 9/16/14 RP 58. Its decision not to renew the motion suggests that it was satisfied that the defendant could get a fair trial from the jurors who were selected to try the case.

Similarly the trial court did not err when it rejected the defense proposed curative instruction. The decision to refuse a proposed jury instruction is reviewed for an abuse of discretion. State v. Ehrhardt, 167 Wn. App. 934, 939, 276 P.3d 332 (2012). A trial court is not required to give inaccurate or misleading instructions. Id.

At that point of the proceedings the proposed instruction inaccurately stated that the defendant faced a mandatory life without parole sentence upon conviction. The defense proposed third degree assault and fourth degree assault as lesser included instructions. 1 CP 148, 149. The court ultimately instructed the jury on those lesser degree offenses. 1 CP 60. Neither degree of assault was a most serious offense which would trigger the persistent offender sentence. RCW 9.94A.030(33), (38). The defendant was not automatically in jeopardy of a life without parole sentence upon conviction as the proposed instruction indicated.

Even if the defendant had been convicted as charged, the State still bore the burden to prove by a preponderance of the evidence the defendant's prior convictions that would qualify him as a persistent offender subject to sentencing under RCW 9.94A.570 State v. Ford, 137 Wn.2d 472, 479-80, 937 P.2d 452 (1999),

superseded by statute on other grounds, State v. Cobos, 182 Wn.2d 12, 338 P.3d 283 (2014). Whether the State would meet its burden of proof had yet to be determined at the point the defendant sought the jury instruction.

The proposed instruction also was misleading in light of other anticipated instructions. The court gave WPIC 1.02 which stated in part that juror had nothing to do with punishment, and could not consider the fact that punishment may follow conviction except to the extent that it made them careful. 1 CP 50. It also instructed jurors that all of its instructions were important. 1 CP 50. By instructing the jurors on the punishment the defendant would receive upon conviction the court would have given jurors the impression that that the jury did have something to with punishment by virtue of its factual determination of guilt. Except in capital cases jurors have nothing to do with punishment. State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). To the extent that it had the capacity to allow jurors to base a decision on the punishment that may follow a conviction the proposed instruction also misstated the law.

The instruction was also misleading because it left the impression that jurors could base their decision on something other

than the law as given to them by the court. A sentence of life without parole has the capacity to evoke an emotional response due to the enormity of the punishment. It may also evoke strong feelings regarding the policy behind that sentence. The proposed instruction did not tell jurors why the court was giving the instruction. Without indication that the instruction was to cure the alleged error occasioned by the juror's comments about his own sentence upon conviction for second degree assault jurors would reasonably be left to believe that they could let personal beliefs or emotional responses have some bearing on the verdict ultimately reached. This impression would be contrary to the court's express instruction that jurors have nothing to do with punishment in case of a violation of law, and the possibility of punishment must not be considered, except that it may make jurors careful. 1 CP 50. Thus, because the proposed instruction was misleading the court properly rejected it.

The defendant cites no authority for the proposition that the court was required to give an instruction in these circumstances. Instead he argues that the juror's response left the misimpression that if convicted the defendant faced a relatively light sentence, and that the court would have discretion in sentencing him. He argues

that the only cure for that alleged error was to grant a mistrial or instruct the jury that the defendant faced a mandatory life without parole sentence upon conviction. As discussed the record does not support the claim that jurors would assume that Juror 18's experience applied across the board, or that even if it did that jurors would treat the defendant's case any less seriously for that reason.

Nonetheless the defendant argues that the jury should have been instructed that he was facing a life without parole sentence upon conviction. He acknowledges that the Supreme Court has said that in noncapital cases a jury should not be informed about sentencing considerations in State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001). He argues that strict rule has been eroded in light of subsequent case authority. That authority is inapplicable to the question presented here.

Townsend, dealt with a claim of ineffective assistance of counsel in a noncapital case when jurors were informed that that the death penalty was not an issue at trial. Id. at 843. Noting the strict prohibition against informing juries about sentencing considerations in that circumstance the court held counsel was ineffective for failing to object. Id. at 846-47. Following the reasoning in Townsend, the court concluded it was error to inform

the jury in an aggravated first degree murder trial that it was not a death penalty case. State v. Mason, 160 Wn.2d 910, 928-31, 162 P.3d 296 (2007), cert. denied, 553 U.S. 1035 (2008). In dicta the court suggested that even though it is error to so inform the jury, there may be valid tactical reasons a defense attorney would acquiesce in giving that kind of instruction. Id. at 930. In Rafay, another aggravated first degree murder case, this court found defense counsel did have valid strategic reasons to have the court inform jurors that it was not a death penalty case. State v. Rafay, 168 Wn. App. 734, 775-780, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023 (2013). Whether there were valid strategic reasons to allow jurors to be informed of sentencing considerations does not address whether error was committed when jurors were so informed. It only means that the defendant was not deprived of his Sixth Amendment right to effective assistance of counsel when counsel allowed that error to occur. For that reason Mason and Rafay do not support the defendant's argument that the court should have instructed the jury as he requested in this case.

The defendant also relies on State v. Portnoy, 43 Wn. App. 455, 718 P.2d 805, review denied, 106 Wn.2d 1013 (1986). There the court found it was error to prohibit the defense from cross-

examining a testifying co-defendant about his sentence when the defendant faced the same sentencing enhancement the co-defendant avoided by pleading guilty and agreeing to testify. Under those circumstances the evidence was relevant to the witness's bias. By prohibiting the defendant from inquiring fully into the witnesses' bias the court violated the defendant's confrontation rights. Id. at 460-61.

The proposed instruction at issue here was not relevant to any issue at trial. Nor did it implicate the defendant's confrontation rights. Thus, the general rule prohibiting courts from informing the jury about sentencing considerations applied.

The defendant asks the court to set aside the general rule in Townsend arguing the reasoning behind the rule has no application in a persistent offender case. He argues that where the court has no sentencing discretion after conviction the jury does have a sentencing function. Aggravated murder cases are like persistent offender cases in this regard; when the death penalty is not at issue conviction results in the same mandatory penalty. However after Townsend the court continued to find error when trial courts informed juries about the potential sentence in aggravated murder cases. Mason, supra, State v. Hicks, 163 Wn.2d 477, 488, 181

P.3d 831, cert. denied, 555 U.S. 919 (2008). Thus the reasoning in Townsend has not lost its application as it relates to persistent offender cases.

Finally, the defendant argues that the strict prohibition against jurors considering punishment conflicts with the court's instruction that jurors consider punishment "insofar as it may tend to make you careful." The instruction is non-specific regarding punishment, and therefore unlike the instruction proposed by the defendant here. Because it is non-specific as to what punishment will be imposed upon conviction it does not conflict with the strict rule that prohibits the trial court from instructing jurors on sentencing considerations.

C. ALLEGED ERROR IN THE SCOPE OF THE PROSECUTOR'S CROSS EXAMINATION OF A DEFENSE EXPERT WITNESS HAS NOT BEEN PRESERVED. THE CROSS EXAMINATION OF THAT WITNESS WAS PROPER. IF ANY ERROR OCCURRED IT WAS HARMLESS.

The defendant called Dr. Stuart Grassian to testify as an expert witness regarding the defendant's mental state. Dr. Grassian reviewed all of the defendant's medical and mental health records from the Department of Corrections and from the Pierce County detention and corrections center. 9/22/14 RP 81-82, 87. From the totality of everything that he reviewed he observed a

picture of the defendant's psychiatric history. 9/22/14 RP 89. He noted that the records indicated instances of suicide attempts, including attempts at Maple Lane juvenile facility and at St. Mary's Medical Center in Walla Walla. He also noted records supporting the finding that the defendant had auditory hallucinations, panic attacks, and paranoia. Some records suggested the defendant had bipolar mood disorder, although there were other diagnoses of antisocial personality disorder and borderline personality disorder. 9/22/14 RP 89-97, 100. Based on his review of the defendant's psychiatric records and an interview with the defendant Dr. Grassian opined that the defendant suffered from bipolar mood disorder not otherwise specified. 9/22/14 RP 99.

Dr. Grassian rejected the diagnoses of antisocial personality disorder on the basis that the records recorded instances where the defendant demonstrated empathy, a trait that was inconsistent with either personality disorder. He pointed to one instance where the defendant protected a guard that had been attacked by another inmate. 9/22/14 RP 101-104. He also rejected records indicating that the defendant had been malingering when he reported psychiatric symptoms and threatened self-harm. 9/22/14 RP 44.

Dr. Grassian also testified that he believed the defendant was in a dissociative state when he attacked Officer Trout. He believed that the defendant's mental health history supported that conclusion. 9/22/14 RP 111, 113. Dr. Grassian opined that as a result of that state the defendant did not have the ability to form the intent to assault Officer Trout. 9/22/14 RP 115. That opinion was based on everything that the witness had reviewed. 9/22/14 RP 105.

On cross examination the prosecutor challenged the bases for Dr. Grassian's opinions. The witness confirmed that he rejected the antisocial personality disorder diagnoses in the records on the basis that the defendant was able to form relationships with his mother and wife. 9/22/14 RP 157. Those relationships occurred while the defendant was in prison or in a group home. He had not verified what the defendant's mother and wife told him about their contact with the defendant. 9/22/14 RP 163-166.

The prosecutor explored the bases for the bipolar diagnosis by questioning him about the reported suicide attempts. She asked the witness about records demonstrating the defendant's motive for making threats of self-harm was to manipulate DOC for some benefit rather than because he was truly suicidal. 9/22/14 RP 170-

174. She questioned the witness about the suicide attempt that he testified to, eliciting that the defendant made a threat to overdose in front of someone as a ploy to be moved from IMU to the hospital and that "it was not a serious suicide attempt." 9/22/14 RP 178-180. On another occasion there was reason to doubt the defendant's report about the number of pills he had taken. 9/22/14 RP 180-181. The prosecutor also questioned the witness about other reports where the defendant made threats to manipulate DOC. 9/22/14 RP 182-186. Dr. Grassian considered the reported suicide attempt on August 11, 2003, and agreed with the mental health provider that the defendant was capable of self-harm "just to make a point." He conceded that there was a basis to conclude the defendant had been malingering, and that there was no evidence from that instance that the defendant was actually trying to commit suicide. 9/24/15 RP 94-95, 102-103, 106. The prosecutor asked the witness about other instances in which the mental health provider thought the defendant had been malingering. Dr. Grassian agreed in those instances there was a basis to support that belief. 9/24/14 RP 107.

The prosecutor challenged Dr. Grassian's conclusion that the defendant did not have antisocial or borderline personality

disorder because he was able to form relationships with other people. She referred the doctor to a note from July 20, 2005 where the treating psychologist noted that the defendant did not seem to have remorse or empathy for others. 9/24/14 RP 127-128. The prosecutor referred Dr. Grassian to another instance where the defendant claimed he was looking for a reason to make some gate money by suing DOC. She asked whether that supported a diagnosis of antisocial personality disorder. 9/24/14 RP 129-130.

The prosecutor also challenged Dr. Grassian's claim that the records demonstrated instances where the defendant was hallucinating. In one instance where the defendant claimed among other things that the rap singer Tupac Shakur was sitting next to him. The examining doctor concluded "rule out malingering." 9/22/14 RP 187-189. Dr. Grassian conceded that the report was consistent with malingering although he did not take a position on that. 9/24/14 RP 91-93. The prosecutor asked Dr. Grassian about another incident where the defendant claimed the FBI was trying to kill him, and that he claimed that a nurse instructed him on how to commit suicide to be safe. He later was overheard telling another inmate that he was making that up. The prosecutor asked Dr. Grassian if that was an instance of malingering. 9/24/14 RP 109-

113. The prosecutor reviewed a note from a psychiatrist stating the defendant claimed he heard voices, but that he had no evidence of that disease process. 9/24/14 RP 126. The prosecutor questioned Dr. Grassian about whether he would rely on the defendant's statements in one report, denying that he had any symptoms related to bipolar mood disorder. 9/24/15 RP 125.

The prosecutor also referred Dr. Grassian to several other records where the defendant was reported to act out. The reports showed that the defendant's behavior was directed toward manipulating DOC to give him something he wanted, rather than as a result of a mental illness. 9/24/14 RP 131-141.

1. The Cross Examination Of The Defense Expert Witness Covered Matters The Witness Discussed In Direct, And Was Designed To Impeach The Credibility Of The Witness.

The defendant first argues that Dr. Grassian was improperly impeached with records that he did not rely on in forming his opinion. BOA at 55. This argument concerns whether hearsay reports from non-testifying experts were introduced improperly as substantive evidence. The defendant's motion in limine did not preserve the issue for review because it related to his prison infraction history, not his medical records. The motion was based on ER 404(b) and ER 403, not hearsay. An evidentiary error is not

preserved unless the specific ground for the objection is stated. State v. Wilbur-Bobb, 134 Wn. App. 627, 634, 141 P.3d 665 (2006). However mid-way through the cross counsel did object to questions concerning a purported suicide attempt on the basis of hearsay. At counsel's request the court instructed the jury that any statement made by a person other than the defendant was to be considered only as it related to the doctor's conclusions. 9/24/14 RP 104-105. The claim of error on that basis has been adequately preserved.

Here cross examination both before and after the objection was proper. Cross examination is limited to matters addressed on direct examination and to matters affecting the credibility of the witness. ER 611(b), State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). When a matter is addressed on direct a party may develop various phases of that subject. State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 668 (1983). A party is not limited to the questions asked on direct examination. Wilson v. Miller Flour Mills, 144 Wash. 60, 66, 256 P. 777 (1927).

On direct examination the witness discussed instances in the record where the defendant was evaluated for psychosis but found to be malingering. Dr. Grassian criticized the record because it did

not explain why. He also suggested that the personality disorder diagnoses in the records were merely a default diagnoses, made either after inadequate evaluation and treatment or as a result of intimidation by corrections officers. He also stated that those diagnoses were made by people not qualified to render that opinion. 9/22/14 RP 44-48.

The State's cross examination was designed to counter these assertions. It reviewed instances where the records demonstrated that the witnesses' criticism was unfounded. By pointing out that there were records where the defendant admitted that he had been lying about his symptoms, the cross examination established that there was a well-founded bases for a number of times when the defendant was found to be malingering. It also undermined the validity of the witnesses' conclusions. It demonstrated the witness did not consider the defendant's entire mental health record objectively, and therefore was biased. It also suggested that his opinion regarding diminished capacity should be rejected because it was based in large part on what the defendant told him about the assault. 9/22/14 RP 106-111. The witness's testimony could be rejected on the basis that it was not objective since he was willing to accept what the defendant told him without

question despite a history of manipulating mental health professionals.

The defendant argues that Dr. Grassian did not rely on the reports cited by the prosecutor in cross exam. For that reason he asserts that the records were used for improper impeachment, citing. Washington Irr & Dev. Co. v. Sherman, 106 Wn.2d 685, 688, 724 P.2d 97 (1987). To support this argument the defendant cites several points in the records where the witness criticized some of the records either because the person making a diagnosis was unqualified to do so or had failed to adequately account for some factors in forming a conclusion, or because the justified accounts of malingering were isolated and did not explain the defendant's overall mental health picture.

The issue in Sherman involved the propriety of admitting hearsay evidence in the guise of cross examination of an expert witness. Sherman, 106 Wn.2d at 687-688. Where the witness had not relied on the report containing the contested conclusions, and the doctors who formed those conclusions did not testify, the cross-examination was improper. Id. While ER 703 and ER 705 allow an expert witness to testify to otherwise inadmissible evidence to explain the basis of his opinion, they do not permit hearsay that is

not necessary to understand the expert's opinion. State v. Martinez, 78 Wn. App. 870, 880, 899 P.2d 1302 (1995).

The cross examination here is not like that at issue in Sherman. The doctor clearly stated in his direct examination that he had reviewed all of the defendant's mental health records, and he based his opinions on everything that he had reviewed. 9/22/14 RP 80-81, 87-89, 105; Ex. 123 page 2. Dr. Grassian's report also demonstrates that he considered all of the mental health reports from DOC and Pierce County, by referencing all of the symptoms and diagnoses in the reports in general terms. Ex. 123 page 7-9. The questions were designed to challenge Dr. Grassian's direct testimony criticizing the quality of the diagnoses and treatment the defendant had received. 9/24/14 RP 163-165. The court specifically limited consideration of statements in those records that were not attributed to the defendant to matters bearing on the doctor's diagnosis. 9/24/14 RP 104.

Nor were the questions like those held improper in State v. Acosta, 123 Wn. App. 424, 98 P.3d 503 (2004). There an expert witness called by the State testified about the defendant's criminal history when explaining his opinion that the defendant did not have diminished capacity. Id. at 435. Because that is not the kind of

information experts in his field reasonably relied on it was inadmissible. Id. at 436-437. Here Dr. Grassian testified that the defendant's entire mental health history was necessary to make a diagnosis. 9/22/14 RP 39.

2. Statements Made By Persons Other Than The Defendant Contained In His Mental Health Records Were Not Admitted As Substantive Evidence During Cross Examination, And Therefore Were Not Hearsay. If Admission Of The Defendant's Statements For Substantive Purposes Was Error, It Was Harmless.

The defense objected on three occasions during the State's cross examination of Dr. Grassian on the basis that the questions involved hearsay. The first occasion related to a newspaper article detailing the circumstances surrounding the defendant and his wife's wedding.[9] The State noted those articles were part of the defendant's medical records, but dropped the line of questioning after the objection was raised. 9/22/14 RP 160-161. Thereafter the defense objected to cross examination questions that addressed statements recorded in medical records attributed to both the defendant and the mental health provider. 9/24/14 RP 102-105, 158-162. The State responded to these objections on the basis

[9] These questions related to Dr. Grassian's reliance on the defendant's relationship with his wife that the doctor cited as a factor in concluding that he did not suffer from a personality disorder.

that they were medical records and the defendant's own statements offered against him. The prosecutor argued that the records were being used to impeach statements the witness made on direct. 9/24/14 RP 104, 163-165.

The defendant argues it was error to admit the statements in his mental health records through cross examination of Dr. Grassian because those statements were hearsay. He argues that they were not admissible either as business records under RCW 5.45.020 or as an exception as statements made for the purpose of medical diagnosis and treatment under ER 803(a)(4). The court should reject these arguments for several reasons.

First, the defendant argues that the State did not lay a proper foundation to authenticate the records as business records. The defendant did not raise this particular objection at trial. It is therefore waived. Wilbur-Bobb, 134 Wn. App. at 634.

Second, jurors were instructed that statements made by persons other than the defendant were not offered for the truth of the matter asserted, but only as they related to Dr. Grassian's diagnosis. 9/24/14 RP 105. Thus, those statements were not hearsay. ER 801(c), State v. Lucas, 167 Wn. App. 100, 109, 271 P.3d 394 (2012).

For that reason they are unlike the statements in the reports at issue in In re J.M., 130 Wn. App. 912, 125 P.3d 245 (2005) cited by the defendant. In J.M. defense counsel stipulated to the introduction of reports by non-testifying experts as substantive evidence in a dependency action. Id. at 916 ¶3. The court found the parent received constitutionally deficient representation because the reports did not qualify for admission under the statutory hearsay exception for business records because they were not routine clerical notations where cross-examination would be of little value. Id. at 923-24. Unlike the reports in J.M., statements by corrections officers and mental health professionals in those reports were not admitted as substantive evidence. Rather they were addressed to test the reliability of statements Dr. Grassian made on direct. 9/24/14 RP 105. That is a permissible purpose for those reports under ER 705. J.M. 130 Wn. App. at 924-925 ¶34.

Third even if it was error for the court to instruct the jury that it may consider the defendant's statements contained in the medical reports for the truth of the matters asserted, any error was harmless. The defendant's statements were an admission of a party opponent, and therefore not hearsay. ER 801(d)(2). However

those statements were reported by non-testifying witnesses. The recording party's statement was hearsay. ER 801(a). It is not likely there was an exception to that second level of hearsay for at least some of those records. For that reason admission of those statements for substantive purposes was error. ER 805. Where error in admission of evidence is the result of violation of a court rule the error "is not prejudicial unless, within reasonable probabilities the outcome of the trial would have been materially affected had the error not occurred." State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

On direct examination Dr. Grassian criticized the records that found the defendant was malingering on the basis that no reason had been given for that diagnosis. 9/22/14 RP 44. During cross examination the prosecutor addressed that testimony by reviewing medical records covering 11 different instances of treatment where the defendant's statements had been recorded both during and after meeting with a mental health professional. Those statements are set out in Appendix B. Had the court extended the limiting instruction to the defendant's statements as well, the outcome of the trial would not have been materially different.

None of the defendant's statements in those records related directly to the issues at trial. The prosecutor addressed those instances to counter the witness's assertion that the malingering diagnoses were baseless. 9/22/14 RP 167; 9/24/14 RP 163-165. Like the statements of other persons in those records they were used for a proper purpose; to challenge Dr. Grassian's credibility. ER 611. In closing the prosecutor argued Dr. Grassian's testimony should be rejected in part because he gave too little weight to records that demonstrated the defendant malingered and manipulated to achieve a particular purpose. 9/30/14 RP 116-117. Given that the statement only related to credibility of the defense expert witness and the State used them for that proper purpose, the court's instruction permitting jurors to consider those statements for substantive purposes was harmless.

3. The Defendant Waived Any Error From The Court's Failure To Conduct An ER 404(b) Analysis Before The State Cross Examined The Witness About The Defendant's Medical Records. Any Error Was Harmless.

The defendant alternatively argues that the court erred in admitting evidence from the medical records regarding the defendant's misconduct and feigned psychological issues without conducting an analysis under ER 404(b) and ER 403. The

defendant did not object to the use of those records on that basis until that portion of the cross examination had been completed. 9/24/14 RP 161-162, 167. The motion in limine and objection on the basis of ER 404(b) was in relationship to the defendant's prison infraction history, particularly for assaults. Contrary to the defendant's claim the prosecutor did raise the issue with the court before attempting to cross examine Dr. Grassian about infraction records. 8/19/14 RP 30-33; 9/24/14 RP 3-11. The defendant's pre-trial motion did not address records related to instances concerning claims of hallucinations, self-harm, or malingering. Since there was no timely objection to that specific evidence on the basis of ER 404(b) or ER 403 the issue has been waived. State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011).

If the court considers the issue then no error occurred. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. ER 404(b). However it may be admitted for an undefined number or proper purposes. State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). The rule relates to admission of prior acts as substantive evidence. K. Tegland, Washington Practice §404.15. When the purpose of other acts evidence is to impeach a

witness the admission of that evidence is governed by other rules. Id. , State v. Wilson, 60 Wn. App. 887, 891-892, 808 P.2d 754, review denied, 117 Wn.2d 1010 (1991).

The defendant argues that the State introduced evidence of the defendant's prior acts for a substantive purpose, i.e. to show that he was violent, destructive, and faked a mental illness in the past, and therefore he acted in conformity with those behaviors in this case. The record does not support that contention. The prosecutor clearly used those records in questioning Dr. Grassian to impeach his opinion. 9/24/14 RP 165. Consistent with that representation the prosecutor argued the jury should give no weight to that expert witnesses' testimony because he did not objectively consider the defendant's past medical history when forming his opinions. 9/30/14 RP 113-120. The prosecutor argued "I would submit that the evidence is clear that no weight should be given to it (Dr. Grassian's testimony). It's clearly biased. He clearly did not consider these things or didn't want to." 9/30/14 RP 117. The prosecutor did not argue that the defendant was a violent or manipulative person, and therefore the jury should believe he assaulted Officer Trout and should disbelieve the defendant when he testified that he did not intend to do so.

Because the evidence was admitted to impeach the witness' expert opinion, and not for some substantive purpose, ER 404(b) does not govern the admissibility of the records used to cross examine that witness. Rather, admission was governed by ER 705. As discussed the court properly allowed evidence of those records pursuant to that rule.

Additionally, since the evidence was admitted to impeach Dr. Grassian, and not to impeach the defendant, the evidence was not more prejudicial than probative under ER 403. Dr. Grassian had already testified on direct that there had been reports that the defendant was malingering. 9/22/14 RP 44. Whether Dr. Grassian adequately considered those records was highly relevant to assess the value of his opinions. Thus cross examination into those areas was proper.

4. The Defendant Received Constitutionally Adequate Representation.

Finally the defendant argues that the objections to the admission of his prior acts during cross examination of Dr. Grassian were adequate to preserve those issues for review. To the extent they were not he argues that he received ineffective assistance of counsel.

The defendant did make hearsay objections during the course of the cross examination. While some of the records were discussed before the objection was made, the State does not argue that the objection was untimely. When the defense did make an objection on that basis it sought and received a limiting instruction that would cover those records already discussed.

Defense counsel did object to the defendant's statements on the basis that they were double hearsay. 9/24/14 RP 105. That objection was properly preserved.

No timely objection to cross examination on the basis of ER 404(b) or ER 403 was made. The defendant's ineffective assistance of counsel argument should therefore be limited to that basis for claimed error.

The Sixth Amendment right to counsel includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant who claims he received ineffective assistance of counsel bears the burden to show that counsel performed deficiently, i.e. that the attorney's performance fell below an objective standard of reasonableness under prevailing professional norms. Id. at 687-688. Evaluation of counsel's performance is based on the facts of

the particular case, viewed at the time of counsel's conduct. Id. at 690. Court's strongly presume that counsel performed within the wide range of reasonable professional assistance. Id. The defendant must show that there was no legitimate strategic or tactical reason for the challenged conduct. State v. Olson, 182 Wn. App. 362, 379, 329 P.3d 121 (2014). An attorney's decision of whether and when to object is considered a strategic or tactical decision. State v. Johnston, 143 Wn. App. 1, 19, 177 P.3d 1227 (2007). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." Id. Where the defendant does not show that the objection he claims counsel should have made would have been sustained, he fails to establish deficient performance. In re Davis, 152 Wn.2d 647, 648, 101 P.3d 1 (2004).

The defendant must also show that he was prejudiced by counsel's alleged unprofessional errors. Strickland, 466 U.S. at 692. The defendant meets this burden when he shows that there is a reasonable probability that, but for those errors the results of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. No prejudice is demonstrated unless the defendant shows

that counsel would have been successful had she objected. State v. McFarland, 127 Wn.2d 322, 337 n. 4, 899 P.2d 1251 (1995).

Counsel made a reasonable strategic decision to not object on the basis of ER 404(b) and ER 403 to the records used in cross examination concerning instances where the defendant reported symptoms of mental illness that were later refuted by evidence that he had been malingering. Counsel had already obtained a limiting instruction from the court directing jurors to consider reports from persons other than the defendant for the sole purpose of evaluating Dr. Grassian's testimony and ultimate conclusions. Thus those records were not considered for substantive purposes. Rather they were considered for a proper purpose. ER 611, ER 705.

Defense counsel did object to admission of the defendant's statements from the medical records on the grounds that they were double hearsay, and that both levels of hearsay were not admissible. 9/24/14 RP 105. Thereafter the court gave the limiting instruction, accepting the State's argument that the defendant's statements were admissible as an exemption to the hearsay rule as a statement of a party opponent. ER 801(d)(2). Counsel could reasonably conclude that the court would not alter its ruling at that

point. Counsel did not perform deficiently when she did not pursue a further hearsay objection.

The defendant argues that counsel performed deficiently when she did not object to every instance of allegedly improper cross examination on the basis of inadmissible impeachment, hearsay, and propensity evidence. BOA at 82. Counsel made clear that she was not making repeated objections because she did not want to alienate the jury. 9/24/14 RP 158. The court had already made a ruling on the hearsay objection, and had given the requested limiting instruction. Counsel could reasonably believe that further objections would not be sustained, and that continually objecting unsuccessfully would be viewed as wasting time in an already lengthy trial. Thus, counsel made a valid strategic decision to limit the number and type of objections made to cross examination of Dr. Grassian.

The defendant also argues that he was prejudiced because the cross examination of Dr. Grassian improperly impeached the witness through whom the defendant primarily presented his diminished capacity defense. As discussed however, with the exception of the defendant's statements, the jury was instructed to consider the subject matter of those records as they related Dr.

Grassian's diagnosis, and not for the truth of the matter. 9/24/14 RP 105. Thus they were admitted only for the purpose of impeachment. ER 703 contemplates that an expert's opinion is subject to impeachment by cross examination on the bases for that opinion. State v. Eaton, 30 Wn. App. 288, 294-295, 633 P.2d 921 (1981). Although the court allowed jurors to consider the defendant's statements for the truth of the matter asserted, none of those statements concerned the defendant's mental state on the date that he assaulted Officer Trout and they were not used for that purpose.

Additionally the challenged statements in those records were not the only basis on which the prosecutor impeached Dr. Grassian's testimony. The prosecutor also challenged the witness's objectivity referring to statements in his report that the defendant was "desperate for help." 9/22/14 RP 142-143. The prosecutor reviewed the DSM IV definition of malingering, which stated that it should be strongly suspected in part when the patient had been referred by an attorney as happened in this case. 9/22/14 RP 149-150. Dr. Grassian conceded on cross exam that there were times when the defendant malingered psychiatric symptoms in order to achieve some purpose without reference to any specific record.

9/22/14 RP 142. The prosecutor challenged the thoroughness of the evaluation, eliciting that the witness did not speak to any other witness to the assault other than the defendant or any mental health professional that had treated the defendant. 9/22/14 RP 145. The prosecutor also challenged the basis for Dr. Grassian's conclusion that the defendant did not have antisocial personality disorder, another factor to be considered in determining whether the defendant was malingering. 9/22/14 RP 150, 156-160. She also challenged the bases of some of the conclusion in his report as supposition, rather than based on fact. 9/24/14 RP 149-150.

The State also produced evidence that rebutted Dr. Grassian's testimony. The defendant was evaluated by Dr. Sauvagnat, a psychologist employed at Western State Hospital. Dr. Sauvagnat talked to the defendant, and reviewed the police reports and video of the assault. Based on those sources she diagnosed the defendant with antisocial personality disorder, borderline personality disorder, and unspecified anxiety disorder. She concluded to a reasonable degree of psychological certainty that he was able to form the intent to assault at the time of the assault. 9/25/14 RP 53, 55-57, 64-68.

The State also presented testimony from mental health professionals who had previously treated the defendant. Those professionals similarly rebutted Dr. Grassian's conclusion that the defendant had bipolar mood disorder and was in a dissociative state when he committed the assault. Dr. Browne, a psychologist, worked with the defendant in the eight months leading up to the assault. There were no signs of psychosis or hallucinations at that time. 9/29/14 RP 26, 31, 49. Dr. Davis treated the defendant from February 2010 to September 2011. He diagnosed the defendant with borderline personality disorder. He saw no symptoms consistent with bipolar mood disorder. He was familiar with the defendant's medical records, and had no concerns about the defendant being psychotic, delusional, or hallucinating. 9/29/14 RP 82, 113, 116-117. Dr. Goins treated the defendant on and off since 1999. Although the defendant was diagnosed with various personality disorders, by 2009 she believed his behavior supported a diagnosis of borderline personality disorder. She observed no evidence of hallucinations except as it related to drug use in 1999. 9/29/14 RP 153, 160; 9/30/14 RP 18, 54, 69.

Finally, Dr. Grassian's testimony did not support a true diminished capacity defense. To establish a diminished capacity

defense the proposed evidence must demonstrate a mental disorder, not amounting to insanity, that impaired the defendant's ability to form the culpable mental state to commit the crime charged. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). The culpable mental state for second degree assault is the intent to assault another. 1 CP 58; RCW 9A.36.021.

Dr. Grassian testified that the defendant said he intended to assault someone other than Officer Trout. Because this report was consistent with the defendant being in a dissociative state he opined that the defendant "had no capacity to form the intent of committing an act against Officer Trout." 9/22/14 RP 108-115. Whether he had the intent to assault Officer Trout did not establish a diminished capacity defense because that offense does not require intent to assault a specific person. Thus one is guilty of second degree assault when one assaults an unintended victim during an assault on an intended victim. State v. Aguilar, 176 Wn. App. 264, 275-276, 308 P.3d 778 (2013), review denied, 179 Wn.2d 1011 (2014). Thus, the evidence base for the defense was weak.

For these reasons the defendant fails to show that his trial attorney's performance in handling the State's cross examination

prejudiced him. The evidence was properly admitted for the limited purpose of impeaching the expert's opinion. Further objection would not have been sustained. Records of specific treatment were not the only basis on which the witness's testimony was challenged. Ultimately, because the evidence of diminished capacity was weak even without cross examination into those reports, there is no reasonable probability that the outcome of the case would have been different. The defendant therefore fails to demonstrate he was prejudiced by counsel's handling of this issue.

D. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL ON THE BASIS OF PROSECUTORIAL ERROR.

The defendant argues that the prosecutor committed several instances of error in cross examining him and in closing argument that deprived him of a fair trial.[10] A defendant bears the burden to

[10] Although this court has often used the term "prosecutorial misconduct," it has recognized that the term is "a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" to intentional acts, rather than mere trial error. See ABA Resolution 100B (Adopted Aug. 9-10, http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf; NDAA, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf. A number of appellate courts agree that "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App.), review denied, 2009 Minn. LEXIS 196 (Minn. 2009); Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 28-29 (2008).

prove that the prosecutor's statements were improper and that they had a prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Comments alleged to be improper are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the court's instructions. Russell, 125 Wn.2d at 85-86. When the claimed error had been objected to at trial, the defendant bears the burden to show that the prosecutorial error resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Allen, 182 Wn.2d 364, 341 P.3d 268, 273 (2015).

Failure to object waives any claim of error unless the remark caused an "enduring and resulting" prejudice that could not have been neutralized by a jury instruction. Russell, 125 Wn.2d at 86. Under this standard the defendant must show that (1) the prejudicial effect of the error on the jury could not have been cured by any instruction and (2) that the erroneous argument resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012).

The defendant identifies two instances when the prosecutor cross examined him that he asserts entitles him to a new trial. In the first instance the prosecutor questioned the defendant about

telling a doctor at SOU that he was going to continue making up mental health symptoms because he thought it might help him in trial, "kind of like what we are doing here." The court sustained the defense objection and struck the comment. 9/24/14 RP 36. In the second instance the prosecutor questioned the defendant about his version of the assault. When he struggled to explain what happened he said "I know. It don't make sense. That's what happens when---"The prosecutor responded "Your claim doesn't make sense." The court sustained the defense objection and struck the comment, instructing the jury to disregard it. 9/24/14 RP 82-83.

Argumentative statements during cross examination are improper. State v. Yates, 161 Wn.2d 714, 776, 168 P.3d 359 (2007), cert. denied, 554 U.S. 922 (2008). They are not prejudicial unless the court concludes there is a substantial likelihood the error affected the jury's verdict. Id. In Yates the court found no prejudicial error from an argumentative statement during cross of a defense witness where the remark was struck and the jury was instructed to disregard any stricken remarks. Id. It was also not prejudicial because the evidence against the defendant was strong. Id.

The prosecutor's remarks were argumentative and therefore erroneous. However the defendant was not prejudiced. Like Yates the court immediately struck the statements and the jury was given curative instructions to disregard the statements. 9/24/14 RP 82-83, 1 CP 48.

Additionally the evidence against the defendant was strong. There was a video recording of the defendant violently assaulting Officer Trout. Ex. 80. The defendant's diminished capacity defense was weak, and rebutted by evidence from psychologists who had treated the defendant in the years leading up to the assault. For this same reason the defendant was not prejudiced if, as the defendant argues, the remarks were a personal comment on the defendant's veracity.

The defendant also points to the prosecutor's closing argument where she addressed the expert testimony in support of the diminished capacity defense. The prosecutor challenged the basis of Dr. Grassian's opinion in part by arguing

> And the other problem is the diagnosis and the things Dr. Grassian relies on. The only time in the past that Jimi Hamilton claimed hallucinations had been when he was trying to get out of something claiming that, whether it was going to the mental health unit in Walla Walla that he wanted to do, or getting out of Pierce

> County Jail, and criminal charges by going to Western State.
>
> At best, we can say he may have actually hallucinated when he was on drugs or coming off of drugs, but there is no other solid evidence of an actual hallucinations that was not made up by the defendant. So if someone like Dr. Grassian is what you get when you are willing to pay $360 an hour, you get someone who has an end goal in mind an decides which facts they are going to rely on, what they are going to do to support that goal.

9/30/14 RP 114-115.

The prosecutor further addressed Dr. Grassian's bias by arguing that "he has an agenda and he gets paid a lot of money to come and say what Mr. Hamilton wants him to say." 9/30/14 RP 114.

The prosecutor also challenged the Dr. Grassian's testimony that there was no credible evidence the defendant malingered a mental illness in the past by going through each of the records had been cross examined about that supported that diagnoses. 9/30/14 RP 116-120. In connection with that she pointed to the lawsuits the defendant filed against DOC arguing that the defendant was "capable of coming up with schemes to get out of things or get to get what he wants." 9/30/14 RP 119.

The prosecutor also challenged the defendant's credibility. In regard to his version of events the prosecutor argued the

defendant was trying to explain away, "which is what he has done before. He goes back to his old standby, I was hallucinating..." and 9/30/14 RP 119, 124.

The defense did not object to any of these arguments. Failure to object waives a claim of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a jury instruction. Russell, 125 Wn.2d at 86. The focus of the inquiry is more on whether the prejudice could be cured. State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Assuming for the sake of argument that any of these arguments were improper an instruction to disregard the arguments could have removed any prejudice resulting from them. Jurors are presumed to follow the court's instructions absent contrary evidence. State v. Lamar, 180 Wn.2d 576, 586, 327 P.2d 46 (2014). Additionally, a timely objection to the first allegedly erroneous argument could have prevented the later arguments by putting the prosecutor on notice that the arguments had been objectionable since the arguments all focused on the theme that Dr. Grassian's opinion should be disregarded.

However the arguments were proper. A statement by counsel that clearly expresses a personal opinion as to the credibility of a witness or the guilt of the defendant is error. State v. Price, 126 Wn. App. 617, 653, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005). Error does not occur unless it is clear and unmistakable that the prosecutor is not arguing an inference from the evidence but is expressing a personal opinion. Id. An argument that "I believe" a particular witness meets this standard. State v. Sargent, 40 Wn. App. 340, 343-344, 698 P.2d 598 (1995). In contrast an argument that the defendant was "just trying to pull the wool over your eyes" was an argument explaining the evidence and not a "clear and unmistakable expression of personal opinion." State v. Calvin, 176 Wn. App. 1, 19, 316 P.3d 496 (2013), review granted on other grounds and remanded, 183 Wn.2d 1013 (2015)

The challenged arguments here are not the kind of arguments that have been found to be an erroneous personal opinion. The arguments relating to Dr. Grassian concerned the evidence tending to show that he was not an objective witness but had a bias toward concluding the defendant had a mental illness and that he lacked intent to assault the officer. The witness testified about the work he did on behalf of prisoners, particularly those with

mental illness, and his rate of pay in this case. 9/22/14 RP 28-32, 123-127. The defendant testified about lawsuits he filed against DOC because it made him feel better at the time but later dropped. 9/23/14 RP 181-183. These arguments were not explicit statements of personal opinion but rather were based on the evidence and reasonable inferences drawn from that evidence. That kind of argument is proper. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), cert denied, 556 U.S. 1192 (2009).

The prosecutor's arguments about the defendant's credibility were proper for that same reason. The defendant admitted that he at one point claimed to be hallucinating in order to get out of his placement or achieve some purpose. 9/24/14 RP 32-34. A reference to this incident was not a clear statement of personal opinion. It was part of the argument that challenged the reasonableness of the defendant's testimony in light of all of the evidence. 9/30/14 RP 120-127.

The defendant also challenges an argument the prosecutor made in rebuttal. The defense did not object to this argument. If it was improper to characterize the defense as a "rabbit hole" a timely objection could have cured any prejudice. Moreover, even if improper, the remarks by a prosecutor are not grounds for reversal

if they were invited or provoked by defense counsel, and were in reply to those acts or statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. Russell, 125 Wn.2d at 86.

During closing counsel discussed the defendant's background in juvenile detention and prison, including his time in solitary confinement. 9/30/14 RP 133-137. She discussed at length the defendant's mental health history, his living situation at the time of the assault, and the accusation he brought against a counsellor to argue there was no rational explanation for the defendant's behavior. 9/301/4 RP 137-146. Counsel also argued the jury should rely heavily on Dr. Grassian's testimony. 9/30/14 RP 152-162. In rebuttal the prosecutor focused on the evidence of the assault, noting the video and witnesses to the assault did not support Dr. Grassian's conclusions. She also cited what the State was and was not required to prove. The "rabbit hole" remark related to those arguments of counsel focusing on matters that did not relate to the elements of the offense. It was pertinent reply to the defense attorney. 9/30/14 RP 163-177.

The defendant also argues that he received ineffective assistance of counsel when counsel did not object to the

challenged arguments. The decision not to object was a valid strategic decision. The remarks were not a clear statement of the prosecutor's personal beliefs and were based on the evidence. Defense counsel could reasonably conclude that an objection would be overruled. Counsel recognized the danger in making repetitive objections. 9/24/14 RP 158. Counsel therefore did not perform deficiently when she chose not to object to the arguments the defendant now argues were erroneous. Johnston, 143 Wn. App. at 19.

E. THE REASONABLE DOUBT INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW.

The court instructed the jury on reasonable doubt using WPIC 4.01. 1 CP 52. The defendant argues that this instruction was reversible error because the phrase "a reasonable doubt is one for which a reason exists..." imposes on juries the obligation to articulate a reason to doubt before finding a defendant not guilty. He argues that the instruction was error in light of cases that hold it is improper to argue that in order to acquit the jurors must be able to state a reason they believe the defendant is not guilty. BOA 96-105.

The defense did not object to this instruction. 9/30/14 RP 104. Generally a court will not consider an issue that has not been raised in the trial court. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The court may review an issue for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). "Manifest" requires the defendant show actual prejudice. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). There must be a plausible showing that the asserted error had a practical and identifiable consequence in the trial of the case. Id. The error must be so obvious on the record that the issue warrants appellate review. Id. at 100.

Whether the reasonable doubt instruction was faulty does raise a constitutional issue. Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). However the instruction was not faulty, and therefore there was no manifest error justifying review.

The reasonable doubt instruction given by the court has been repeatedly approved by courts as a correct statement of the law for more than 50 years. State v. Tanzymore, 54 Wn.2d 290, 291, 786 P.2d 277 (1959), State v. Olson, 19 Wn. App. 881, 884-85, 578 P.2d 866 (1978), reversed on other grounds, 92 Wn.2d 134

(1979), State v. Pirtle, 127 Wn.2d 628, 656-658, 904 P.2d 245 (1995), cert denied, 518 U.S. 1026 (1996).

The defendant's argument here was rejected in State v. Thompson, 13 Wn App. 1, 533 P.2d 395 (1975). The court explained:

> [T]he particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary. A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years.

Id. at 5, citing State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901). Today, that statement could be changed to "over 110 years."

Recently the court again approved the instruction as a correct statement of the reasonable doubt standard. State v. Kalebaugh, 183 Wn.2d 578 ¶12, 355 P.3d 253 (2015). The Supreme Court has exercised its supervisory authority and directed trial courts to use that instruction. State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). To change that instruction would require overruling Bennett. This court is required to follow controlling precedent from the Supreme Court. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578 ¶ 18, 146 P.3d

423 (2006). Only the Supreme Court can overrule Bennett. Given this line of authority there is no obvious error that justifies review.

Despite this line of authority the defendant argues that the instruction erroneously required jurors to articulate a reason to doubt. Since the court has held this type of argument was improper, it should likewise be held improper in a jury instruction. The court's reasoning in Kalebaugh forecloses this argument. There in preliminary instructions the trial court instructed jurors on reasonable doubt using WPIC 4.01. The court then went on to explain reasonable doubt as a doubt "for which a reason can be given as to the defendant's guilt." Kalebaugh, 183 Wn.2d ¶4. (emphasis added). The court found this additional instruction was manifest error. Id. ¶12. The court specifically found the trial court's additional instruction was not akin to the fill-in the blank arguments it previously found erroneous. Id ¶ 13. The court concluded the error was harmless however because the instruction did not lower the State's burden of proof and the court properly instructed the jury several times using WPIC 4.01. Because that instruction cured any prejudice that could have occurred from the erroneous instruction the error was harmless. Id. ¶13-16.

Since the court has specifically approved the language in WPIC 4.01, and found that even a deviation from that language did not require jurors to articulate a reason for doubt, the phrase "a reason" in the standard instruction likewise does not impose that requirement on jurors. Since the instruction was not erroneous, the defendant has not demonstrated "manifest error." The issue is therefore waived.

F. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL UNDER THE CUMULATIVE ERROR DOCTRINE.

The defendant argues that the cumulative effect of errors arising from his pretrial motions to dismiss and from trial errors justify granting him a new trial. The cumulative error doctrine is limited to those instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). It does not apply where there are few errors that had little or no effect on the outcome of the trial. Id.

The defendant cites "egregious misconduct" on the part of DOC as one error justifying a new trial. The claimed misconduct involved matters that occurred pre-trial. Nothing from those claimed

errors was introduced at trial. DOC actions do not constitute an error that would be considered under the cumulative error doctrine.

The remaining errors were minor and had no effect on the verdict. The prosecutor's argumentative statements in cross examination were immediately struck and the jury was ordered to disregard them. The defendant's statements reviewed in cross examination were admitted in violation of ER 805, but they were not used for an improper purpose. No other prejudicial error occurred. These two minor errors do not justify reversal.

G. THE DATE OF OFFENSE AND CONVICTION IS A "FACT OF PRIOR CONVICTION" THAT THE COURT WAS ALLOWED TO DETERMINE BEFORE FINDING THE DEFENDANT HAD TWO PRIOR "STRIKE" OFFENSES.

At sentencing the State produced certified copies of the defendant's prior convictions for First Degree Robbery, Pierce County cause no. 99-1-03745-8, 3 CP 838-848, First Degree Robbery, Pierce County cause no. 06-1-05292-9, 3 CP 825-837, and First Degree Robbery, Pierce County cause no. 07-1-00229-6, 3 CP 812-824. Based on this evidence the court found the defendant has two prior strike convictions. Accordingly the court sentenced the defendant as a persistent offender. 10/2/14 RP 6-7.

The defendant argues that the trial court erred by performing what he argues was a jury function, i.e. to determine that the convictions were "prior" convictions. Because that condition is part of the defendant's criminal history which a trial court may determine prior to setting a sentence, no error occurred.

"Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Supreme Court recently reaffirmed that a "neither the federal nor state constitution requires that previous strike offenses be proved to a jury." State v. Witherspoon, 180 Wn.2d 875, 897, 329 P.3d 888 (2014).

The defendant argues the court in Witherspoon did not consider the precise issue presented here, and therefore it does not control the outcome of this case. BOA at 109. However the court has read the prior conviction exception to encompass facts that follow necessarily or as a matter of law from the fact of a prior conviction. State v. Jones, 159 Wn.2d 231, 243, 149 P.3d 636 (2006), cert. denied, 549 U.S. 1354 (2007). Facts such as community placement status or the identity of the offender are facts

that are "intimately related to the prior conviction" and therefore fall within that exception to Apprendi. Id. at 241, State v. Rudolph, 141 Wn. App. 59, 69, 168 P.3d 430 (2007), review denied, 163 Wn.2d 1045 (2008). The court reasoned that these kinds of facts need not be determined by a jury because (1) they were inherently reliable because they could be readily determined by reviewing court records related to the prior conviction, (2) it arose out of a prior conviction based on a finding of guilt by a jury or a guilty plea, and (3) is the type of inquiry traditionally performed by judges as part of the sentencing function. Jones, 159 Wn.2d at 244-245.

Like the fact of community placement or identity of the defendant, the date on which the crime was committed can be determined from the face of the certified judgment and sentences. Here the judgment in each cause numbers submitted as part of the proof of the defendant's criminal history clearly stated the date of each offense and the date that the defendant was convicted of that offense. 3 CP 814, 827, 840. The court found these documents provide the best evidence of a prior conviction. Ford, 137 Wn.2d at 480.

The defendant argues that the temporal sequence of prior convictions is a fact that should have been decided by a jury,

relying on United States v. Salazar Lopez, 506 F.3d 748 (9th Cir. 2007). There the court considered whether a defendant was subject to an enhanced sentence under 8 U.S.C. §1326(b)(1). That statute provided for an enhanced sentence if the defendant was a previously removed alien who had been removed after a felony conviction. The court concluded the enhanced sentence was erroneous because the government never pled nor proved the date of the prior removal. Id. at 751-752.

Salazar Lopez provides no support for the defendant's argument because a prior removal is not a prior conviction. Before the court decided that case it explicitly rejected the claim that the dates of a prior conviction are not part of the "fact" of the defendant's prior conviction in United States v. Grisel, 488 F.3d 844, 847 (9th Cir. 2007), cert denied, 552 U.S. 970 (2007). The court relied on Grisel to clarify its decision in Salazar Lopez that the conviction preceding the prior removal was a fact the trial judge and not a jury was permitted to determine. United States v. Nebdiza-Zaragoza, 567 F.3d 431, 436 (9th Cir. 2009), cert. denied, 558 U.S. 957 (2009). Thus no sentencing error occurred.

VI. CONCLUSION

For the foregoing reasons the State asks the court to affirm the defendant's conviction for second degree assault and his sentence as a persistent offender.

Respectfully submitted on September 29, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: Kathleen Webber
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent

State v. Hamilton
Instructions for playing trial exhibit 80

1. Insert CD into a computer that is not hooked up to the internet or any network.

2. The system is run on Vicon Net. When the CD is inserted into the computer a screen will come up asking the user to select one of two run applications. Select the auto run application to turn the software on.

3. A log on screen will appear. The username will say admin, it will ask for a password. Below that is a log in button. Next to the login button is a button that says Guest. Select Guest. If that doesn't work then go back and click Admin and click enter with no password.

4. On the left side of the page will be the word Vicon Net with a blue dot next to it. Click on the blue dot and word Vicon Net.

5. A drop down box will appear. The user can select all four cameras at the same time, or one camera at a time to view the video. The video may open up at the end of the video. Push the rewind button to start the video at the beginning. This step is necessary for each camera view. Push the playback button to start the video playing.

APPENDIX A

State v. Jimi Hamilton
no. 72516-5-1
State's cross examination of Dr.Grassian

1. December 13, 1998 – the defendant denies symptoms consistent with bipolar disorder. 9/24/14 RP 125. January 3, 1999 the defendant authors a letter to the associate superintendent complaining about not being transferred to a higher step in treatment after being infraction free for four months. The defendant states that being in treatment will not be in his best interest for several enumerated reasons. 9/22/14 RP 182-184.

2. July 20, 1999, August 31, 1999, October 10, 1999. - In a psychiatric assessment the defendant states he had been high on formaldehyde or methamphetamine, he claimed to be followed by the FBI, and he claimed that the rap singer Tupac Shakur was sitting next to him. The defendant later admits he made up that story, and explains why he did so. 9/22/14 RP 187-188, 190; 9/24/14 RP 88.

3. February 23, 2000 – The defendant is being treated for a suicide attempt. The defendant states that the FBI is out to kill him. The defendant also stated that a nurse instructed him on how to commit suicide. He was later overheard telling another inmate that he lied about those statements, that he had taken certain medications and why, and that he was able to manipulate the State's mental health system. 9/24/14 RP 109-112.

4. January 15, 2001 – The defendant reports taking multiple medications, but denies that is a suicide attempt. 9/22/14 RP 180.

5. August 11, 2003 – a mental health professional reports seeing the defendant with a noose around his neck. Later a corrections officer overhears the defendant

APPENDIX B

telling another inmate that the intent was to tie up the suicide rooms to make problems for corrections. 9/24/14 RP 94, 103-104.

6. May 31, 2003 – The defendant admits that he broke a sprinkler head in his cell because he wanted to see the corrections officers respond. The next day when the defendant is placed in a restraint bed in another cell he comments on the number of screws in the light fixtures, and then remarks that it is all just a game. 9/24/14 RP 136-138.

7. July 20, 2005 – the defendant reports to a psychiatrist that he has ADHD and is not responsible for his behavior. The defendant claims that he has bipolar disorder. 9/24/14 RP 127-129.

8. August 9, 2005 – a psychiatrist reports the defendant is rambling and claims that he hears voices. 9/24/14 RP 126.

9. February 28, 2008 – a psychologist reports talking to the defendant in a restraint bed. The defendant states that he has been spiraling down in recent weeks and it is difficult to catch himself and turn it off, especially after years of learned behavior. 9/22/14 RP 176.

10. November 18 and 19, 2008 – the defendant makes statements threatening to hurt himself and damage his cell if he is not removed from his unit after a disagreement with a corrections officer. The next day the defendant admits that he is not suicidal but would harm himself if he did not get a visit. 9/22/14 RP 172-173.

11. April 2, 2013 – During a mental health evaluation in which the defendant was diagnosed with bipolar disorder the defendant states that he had been self-medicating

with methamphetamine. After an episode where the defendant cut himself he denied any psychotic symptoms. 9/22/14 RP 167-170.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent, v. JIMI J. HAMILTON, Appellant.	No. 72516-5-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 29th day of September, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Kevin A. March, Nielsen, Broman & Koch, MarchK@nwattorney.net and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of September, 2015, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR

September 29, 2015 - 4:26 PM

Transmittal Letter

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